A TREATISE

ON THE

LAW AND PRACTICE

OF

BANKRUPTCY

UNDER THE ACT OF CONGRESS OF 1898
AND ITS AMENDMENTS

BY

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CHAPTER XXII

RIGHTS OF TRUSTEE AS AGAINST PRIOR ASSIGNEE FOR CREDITORS

§ 433. Assignment an Act of Bankruptcy.—Under the bankruptcy act of 1867, the making of an assignment for the benefit of creditors, without preferences, was not necessarily an act of bankruptcy. If the assignor had a purpose to hinder, delay, or defraud creditors, or to defeat or delay the operation of the bankruptcy act, it was ground for adjudging him bankrupt. But it depended upon his intention in making the assignment, and this was a question of fact,[1] although it was sometimes held that such an assignment would be presumed to have been made with the intention of delaying the operation of the bankruptcy law, where the exercise of the powers granted by the assignment would necessarily have that effect.[2] But this has been changed by the present statute. Under its terms, and without any reference to the purpose or intent of the debtor, it is made an act of bankruptcy if a person shall have "made a general assignment for the benefit of his creditors," [3] within four months prior to the filing of the petition in bankruptcy. Hence such an assignment is ipso facto cause for an adjudication in bankruptcy, if made the basis of an application in due time by the requisite number of creditors, although made under a state insolvency law and in strict compliance with its provisions,[4] and notwithstanding that it may provide for the equal distribution of the debtor's property among all his creditors, without any preferences.[5]

[1] Langley v. Perry, 2 N. B. R. 596, Fed. Cas. No. 8,067.

[2] In re Chamberlain, 3 N. B. R. 710, Fed. Cas. No. 2,574.

[3] Bankruptcy Act 1898, § 3a. And see supra, § 91. Assignment for benefit of creditors as an act of bankruptcy when made by a partnership, see supra, § 113. When made by a corporation, supra, § 144.

[4] In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440.

[5] In re Temple, 4 Sawy. 92, 17 N. B. R. 345, Fed. Cas. No. 13,825.

§ 434. Effect of Adjudication in Bankruptcy on Previous Assignment.—A general assignment for the benefit of creditors, though an act of bankruptcy and liable to be avoided by the subsequent adjudication of the assignor as a bankrupt, is not void originally, but only voidable; it remains valid unless and until such an adjudication is made.[6] Potentially it is a fraud upon the bankruptcy law and upon the creditors, since its necessary effect (if allowed to stand) is to defeat the operation of the bankruptcy law and to deprive creditors of the benefit of all the provisions of that act which are made for their protection and meant to secure a speedy and equal distribution of the estate.[7] The assignment is therefore voidable at the instance of the creditors, provided a sufficient number of them, owning a sufficient amount of claims, will join in a petition in bankruptcy.[8] Of course they are not compelled to take this step. If they are satisfied to have the debtor's property collected and distributed by his voluntary assignee, if they do not see any advantage in bringing it into bankruptcy, or if they are simply indifferent to their rights, they may acquiesce in the assignment, present and prove their claims, and waive their right to invoke the jurisdiction of the court of bankruptcy. Or the same result will follow if they neglect for more than four months to file a petition in bankruptcy. The mere existence of a bankruptcy law which creditors may set in motion if they choose, does not prevent the administration of the estate by the voluntary assignee, if creditors acquiesce in it. As stated above, the assignment is not void ab initio, but only voidable. But if, on the other hand, the creditors, or a sufficient proportion of them, choose to have the assignment vacated and the estate administered in bankruptcy, then it is voidable at their option, and if they file a petition in the proper federal court, alleging the assignment as an act of bankruptcy and praying for an adjudication in bankruptcy against the debtor, they thereby take the proper and only necessary step for avoiding the assignment. And if thereupon the assignor is adjudged bankrupt, the decree of adjudication ipso facto annuls or dissolves the assignment and subjects the assigned property to the exclusive and

[6] Gilbert v. Mechanics' & Metals Nat. Bank, 172 App. Div. 25, 157 N. Y. Supp. 953; Charles Roesch & Sons Co. v. Mumford, 230 Fed. 56, 144 C. C. A. 354; In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; Ostrander v. Meunch, 12 Fed. 562; Barnes v. Rettew, Fed. Cas. No. 1,019; Maltbie v. Hotchkiss, 38 Conn. 80, 9 Am. Rep. 364, 5 N. B. R. 485; Cook v. Rogers, 31 Mich. 391, 13 N. B. R. 97; Thrasher v. Bentley, 59 N. Y. 649; Bostwick v. Burnett, 7 N. Y. 317. Until an assignment for the benefit of creditors is expressly accepted, it is a mere power and therefore revocable, and the bankruptcy of the assignor operates as a revocation. Ashley v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

[7] In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; s. c. below, 90 Fed. 475, 1 Am. Bankr. Rep. 78.

[8] In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117.

complete jurisdiction of the court of bankruptcy.[9] That this consequence necessarily follows the adjudication in bankruptcy will be plainly seen from a moment's consideration of the results which would follow from an opposite construction. "It is an extraordinary proposition that the bankruptcy court can be asked to discharge a person from all his debts who has, by an assignment to a private assignee, placed all his property where it can be administered only by the tribunals of the state. A system of bankruptcy which would thus, in practice, permit a discharge of the debtor without a simultaneous administration and distribution of the property among the creditors, would be a monstrosity."[10] Nor is the situation in any way affected by the fact that proceedings have been taken in a state court to have the administration of the assigned estate take place under its supervision and control. The pendency of such proceedings, or the making of orders or decrees by the state court, will not prevent an adjudication of bankruptcy, but on the contrary, when the adjudication is made, it ousts the jurisdiction of the state court and establishes the jurisdiction of the bankruptcy court, which is exclusive and which relates back to the commission of the act of bankruptcy, that is, the making of the assignment.[11] And if the assignment falls to the ground in consequence of the adjudication in bankruptcy, so also do all rights and interests created by it or growing out of it. The various rights of creditors thereafter are to be determined according to the provisions of the bankruptcy law, not according to the deed of assignment nor according to the state insolvency law under which it may have been made,[12] and the money and property are to be distributed by the trustee in bankruptcy, and not by the assignee.[13] If the deed of assignment created any liens or trusts, they are annulled by the adjudication, and the property is not subject to them as it passes

[9] Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Smith, 4 Ben. 1, 3 N. B. R. 377, Fed. Cas. No. 12,974; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311, Fed. Cas. No. 5,486; Waring v. Buchanan, 19 N. B. R. 502, Fed. Cas. No. 17,176; In re Croughwell, 9 Ben. 360, 17 N. B. R. 337, Fed. Cas. No. 3,440; Dolson v. Kerr, 52 How. Prac. (N. Y.) 481, 16 N. B. R. 405; Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947.

[10] In re Brodhead, 3 Ben. 106, 2 N. B. R. 278, Fed. Cas. No. 1,918.

[11] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1; In re Lengert Wagon Co., 110 Fed. 927, 6 Am. Bankr. Rep. 535; In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440, affirmed, 94 Fed. 630, 36 C. C. A. 430, 2 Am. Bankr. Rep. 226.

[12] In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1,704. After the adjudication in bankruptcy, an action against the debtor of the bankrupt cannot be maintained by the bankrupt's assignee for the benefit of creditors. Gilbert v. Mechanics' & Metals Nat. Bank, 95 Misc. Rep. 364, 160 N. Y. Supp. 710.

[13] Sedgwick v. Place, 3 N. B. R. 302 Fed. Cas. No. 12,623.

into the hands of the trustees in bankruptcy.[14] So also, if the assignment gives a preference to any creditor, it is avoided in bankruptcy, and the preferred creditor can claim no advantage from it.[15]

§ 435. **Assignment More Than Four Months Before Bankruptcy.**—In order to take advantage of a general assignment, as an act of bankruptcy, creditors must file their petition within four months. But this time does not expire until four months after the date of recording or registering the assignment, if that is required or permitted by law, or if it is not, then four months from the date when the petitioning creditors receive actual notice of the assignment, or if they have no actual notice, then four months from the date when the assignee takes notorious, exclusive, or continuous possession of the property.[16] If the limited period as thus defined is allowed to lapse without the filing of a petition in bankruptcy, then creditors must be presumed to have waived or acquiesced in the act of bankruptcy, and the assignment is not avoided or in any way affected by the bankruptcy law, but must stand or fall upon its own merits, being open to attack only in the state courts and only under the provisions of the state laws. The bankruptcy law does not attempt to supervise or inquire into proceedings under an assignment for creditors or under state insolvency laws begun more than four months before the institution of bankruptcy proceedings.[17] If the debtor is thereafter adjudged bankrupt (though it must necessarily be on other grounds than the making of the assignment), the assignment cannot be set aside at the instance of the trustee in bankruptcy, and the latter will not be entitled to the possession and administration of the assigned estate as against the voluntary assignee, but he will only take such rights as the bankrupt had or could himself claim at the date of the bankruptcy.[18] At the very least it may be said that the court of bankruptcy will not undertake to review the accounts of the assignee, or to reverse or annul any act of his in collecting or paying out the estate,

[14] In re Slomka, 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635.

[15] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1.

[16] Bankruptcy Act 1898, § 3b.

[17] In re Creech Bros. Lumber Co., 240 Fed. 8, 153 C. C. A. 44, 39 Am. Bankr. Rep. 487; In re Bridge (D. C.) 230 Fed. 184, 37 Am. Bankr. Rep. 53; In re Boner, 169 Fed. 727, 22 Am. Bankr. Rep. 151; Pelton v. Sheridan, 74 Or. 176, 144 Pac. 410.

[18] Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377; In re Kimball, 16 N. B. R. 188, Fed. Cas. No. 7,770; In re Arledge, 1 N. B. R. 644, Fed. Cas. No. 533; Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956; Mathews v. Stewart, 44 Mich. 209, 6 N. W. 633. Where an assignment for the benefit of creditors was valid and not subject to attack because of the assignor's bankruptcy, a judgment of the state court confirming the title of the assignee and ordering a sale of the property was held not subject to attack in the federal court on the ground that it gave a preference, but the trustee in bankruptcy could assert his rights only in the state court. Stern v. Truax (D. C.) 236 Fed. 1014, 38 Am. Bankr. Rep. 418.

antedating the adjudication in bankruptcy, though perhaps the trustee may lay claim to any property remaining undistributed in the hands of the assignee at that date, on the theory that such assignee is the "agent" of the bankrupt and therefore amenable to the jurisdiction of the courts of bankruptcy. This doctrine finds support in at least one of the adjudged cases.[19]

§ 436. Enjoining Action by Assignee.—When an insolvent debtor makes a general assignment for the benefit of his creditors, and, within four months thereafter, a petition in bankruptcy against him is filed, it is within the power and jurisdiction of the court of bankruptcy to make an order, pending the hearing on such petition, enjoining the assignee from disposing of or interfering with the property transferred to him under the assignment, or exercising any acts of ownership or control, and this course is particularly proper when it appears that the assignee is about to make a sale of the property or to pay out money in his hands, so that, if an adjudication in bankruptcy is ultimately made, assets of the estate might thus be withdrawn from the reach of the trustee.[20] So also, after a decree of adjudication is made, and pending the appointment of a trustee in bankruptcy, the court may enjoin the voluntary assignee from disposing of the property or exercising any of the powers given him by the assignment, except merely to hold possession of the property and preserve it.[21] And if the circumstances warrant such a course, the court of bankruptcy, pending a determination on the petition, may appoint a receiver (or the marshal) to take the property out of the hands of the assignee and hold it until the dismissal of the petition or the appointment of a trustee.[22] But this action can only be taken by the court of bankruptcy, and creditors must apply to that court if they desire to take precautions for the preservation of the estate. If, pending a hearing on the petition in bankruptcy, the creditors simply go into a state court and there protest against any further proceedings under the assignment, this will not have the effect of a writ of injunction from the court of bankruptcy.[23]

[19] In re Carver, 113 Fed. 138, 7 Am. Bankr. Rep. 539.

[20] In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Skoll, 16 N. B. R. 175, Fed. Cas. No. 12,926. See Ex parte Nightingale, Fed. Cas. No. 10,263, holding that a mere possibility of waste or misapplication of the bankrupt's estate by the assignee will not justify an injunction.

[21] Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704.

[22] In re Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; Sedgwick v. Place, 3 N. B. R. 139, Fed. Cas. No. 12,619.

[23] In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782.

§ 437. Trustee's Proceedings to Avoid or Set Aside Assignment.—Under the former bankruptcy law it was held that the title to property embraced in a general assignment for the benefit of creditors did not vest in a trustee in bankruptcy subsequently appointed by the mere force of the adjudication and his appointment as trustee. It was voidable at his instance, but to enable him to gain possession and administration of the property it was necessary for him to bring an action against the assignee to have the assignment set aside, just as he must sue to avoid a fraudulent conveyance or recover a preference.[24] But under the present statute, the rules are essentially different. It is true that an assignment is not absolutely void, but only voidable. But it is voidable at the instance of the creditors, and they elect to avoid it, and take the necessary steps to avoid it, when they file the petition in bankruptcy. If an adjudication follows, it avoids the assignment automatically and of its own force. The trustee thereupon becomes invested with title to the property embraced in the assignment, and he does not take title as the successor of the assignee, but as the successor of the bankrupt. No suit or proceeding on his part to avoid the assignment is required, but the assignee may be summarily cited to appear in the bankruptcy proceedings and surrender the property in his hands.[25]

In effect, an assignee for the benefit of creditors, as the law now stands, is charged with knowledge that he is acting under an instrument which of itself is an act of bankruptcy, and that if the assignor, in proceedings commenced within four months after the assignment, is adjudged bankrupt, he will hold the assigned estate merely for the use of the bankrupt's creditors, to be administered in the bankruptcy court.[26] The assignee is therefore charged with notice of the subse-

[24] Means v. Dowd, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429; Wehl v. Wald, 18 Blatchf. 163, 3 Fed. 93; Olney v. Tanner, 21 Blatchf. 540, 18 Fed. 636; Harding v. Crosby, 17 Blatchf. 348, Fed. Cas. No. 6,050; In re Pierce, 3 N. B. R. 258, Fed. Cas. No. 11,141; Macdonald v. Moore, 8 Ben. 579, 15 N. B. R. 26, Fed. Cas. No. 8,763; Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; Von Hein v. Elkus, 8 Hun (N. Y.) 516; Barnewall v. Jones, 14 N. B. R. 278, Fed. Cas. No. 1,027; Linder v. Lewis, 4 Fed. 318; Sparhawk v. Drexel, 12 N. B. R. 450, Fed. Cas. No. 13,204; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408; Haas v. O'Brien, 66 N. Y. 597, 16 N. B. R. 508; Barnes v. Rettew, 8 Phila. 133, Fed. Cas. No. 1,019.

[25] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Comingor v. Louisville Trust Co., 108 S. W. 950, 33 Ky. Law Rep. 53; In re Stokes, 103 Fed. 312; In re Thompson, 122 Fed. 174, 10 Am. Bankr. Rep. 242; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; Whittlesey v. Philip Becker & Co., 142 App. Div. 313, 126 N. Y. Supp. 1046; Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394. And see cases cited, supra, § 434, and infra, §§ 438, 439.

[26] In re Bombino, 44 Utah, 141, 138 Pac. 1155.

quent filing of a petition in bankruptcy against his assignor, and if the adjudication is made, the assignee becomes a mere custodian without title.[27] In such circumstances, the court of bankruptcy obtains exclusive jurisdiction, and has power to remove the assignee, irrespective of his good faith and standing, and to appoint its own receiver.[28]

§ 438. Recovery of Assets by Trustee.—When a voluntary assignment for the benefit of creditors is avoided by the subsequent adjudication of the assignor in bankruptcy, the trustee in bankruptcy becomes entitled to the possession and administration of the estate covered by the assignment and may require the assignee to account to him and to surrender the property in his hands.[29] And although the law of the state may require such assignments to be carried out under the direction or supervision of a state court, and the property assigned is in process of administration in the manner prescribed by the law; this does not make a case of concurrent jurisdiction, nor give the state court such a prior right of possession as will prevent the court of bankruptcy from assuming exclusive jurisdiction of the bankrupt's estate.[30] If the state statute does not go to the length of making such an assignee an officer of the state court, property in his hands is not in the custody of the law or the possession of the court.[31] So, if the assignee is cited to account in a state court, he may show, in bar of the proceeding, that the property has been taken from him under a decree of the court of bankruptcy and that he has accounted in the latter court.[32] Nor is the

[27] In re Louis Neuburger, Inc. (D. C.) 233 Fed. 701, 37 Am. Bankr. Rep. 248.

[28] In re D. & E. Dress Co. (D. C.) 244 Fed. 885, 40 Am. Bankr. Rep. 360.

[29] Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; Comingor v. Louisville Trust Co., 108 S. W. 950, 33 Ky. Law Rep. 53. A petition by the trustee in bankruptcy for an order requiring the surrender of property by the assignee need not allege a previous demand. Comingor v. Louisville Trust Co., 108 S. W. 950, 33 Ky. Law Rep. 53. Under the bankruptcy act of 1867, it was held that an order or decree for the surrender of property by the assignee should not include property exempt from execution. Grow v. Ballard, 2 N. B. R. 194, Fed. Cas. No. 5,848. But this is probably not the case under the present statute, since it intends that the trustee shall take possession of the exempt property, as well as all other property, and provides for his setting it apart to the bankrupt.

[30] In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9. But if the assignee alleges that he is under the control and direction of the state court, there is nothing to prevent the trustee from applying to that court for an order directing the surrender of the property to him, just as he would do in the case of a receiver. See Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320.

[31] Jones v. McCormick Harvesting Mach. Co., 82 Fed. 295, 27 C. C. A. 133; Lehman v. Rosengarten, 23 Fed. 642.

[32] Burkholder v. Stump, 8 Phila. (Pa.) 172, 4 N. B. R. 597, Fed. Cas. No. 2,165. And on the other hand, though the assignee's accounts have been approved by the state court, he may still be required to account to the court of bankruptcy, as the jurisdiction of the latter court is paramount and cannot be defeated by any proceedings in the state court. In

pendency of an action of replevin against him any excuse for his failure to surrender to the trustee in bankruptcy that portion of the estate affected by the proceeding.[33] If the assignee is prosecuting an action to recover property of the assigned estate, when a trustee in bankruptcy is appointed, the latter may intervene in the action and assume control of it, and need not begin a new suit.[34] The assignee may also be required to execute any conveyance which may be necessary to show a clear title in the trustee or enable him more effectually to proceed with the collection of the assets.[35] And if the assignee neglects or refuses to account for the money and property in his hands, on being cited and ordered to do so, the trustee in bankruptcy has a right of action against the surety on the assignment bond.[36]

§ 439. Same; Summary Proceedings and Attachment for Contempt. —When a debtor who has made a general assignment for the benefit of his creditors is adjudged bankrupt within four months thereafter, the court of bankruptcy has jurisdiction and power to make an order requiring the assignee to submit his accounts and to turn over to the trustee in bankruptcy all money and property in his hands, and this does not require a plenary suit at law or in equity, but may be done in a summary proceeding.[37] For the assignee in such a case is not an adverse claimant. He is merely the agent of the assignor for the distribution of the proceeds of the property, and, as such agent, his possession is that of his principal.[38] Or as otherwise stated, the assignee "is a mere naked bailee for the creditors, without a shred of title or lawful authority to the possession of the bankrupt's estate, and it would certainly be strange if, when the bankruptcy court finds property in the possession of such a bailee, it may not in a summary way require him to surrender possession to the court which alone has the

re Louis Neuburger, Inc., 240 Fed. 947, 153 C. C. A. 633, 39 Am. Bankr. Rep. 139.

[33] In re Solomon, 2 Nat. Bankr. News, 460.

[34] Collateral Security Bank v. Fowler, 42 Md. 393, 12 N. B. R. 289.

[35] Burkholder v. Stump, 8 Phila. (Pa.) 172, 4 N. B. R. 597, Fed. Cas. No. 2,165.

[36] Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947.

[37] Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; In re McCrum, 214 Fed. 207, 130 C. C. A. 555, 32 Am. Bankr. Rep. 604; In re Karp (D. C.) 228 Fed. 798, 36 Am. Bankr. Rep. 414; In re Reiswig (D. C.) 253 Fed. 390, 42 Am. Bankr. Rep. 161; In re Stewart, 179 Fed. 222, 102 C. C. A. 348, 24 Am. Bankr. Rep. 691; In re Smith (D. C.) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Stokes (D. C.) 106 Fed. 312, 6 Am. Bankr. Rep. 262; In re Thompson (D. C.) 122 Fed. 174, 10 Am. Bankr. Rep. 242.

[38] In re McCrum, 214 Fed. 207, 130 C. C. A. 555, 32 Am. Bankr. Rep. 604; Galbraith v. Vallely (C. C. A.) 261 Fed. 670, 44 Am. Bankr. Rep. 523; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268; In re Colwell Lead Co. (D. C.) 241 Fed. 922, 39 Am. Bankr. Rep. 228; In re Stewart, 179 Fed. 222, 102 C. C. A. 348, 24 Am. Bankr. Rep. 691.

power to administer the estate."[39] But even a summary proceeding requires notice to the party to be charged and that he shall have an opportunity to be heard. Such an order cannot be made on the ex parte application of the trustee without bringing in the assignee or affording him an opportunity to show cause against the petition. If these conditions are not fulfilled, an order for the surrender of property is without jurisdiction, and the assignee cannot be punished for failure to obey it.[40] And in any event, the process of attachment for contempt should not be used to force the restitution of money or property which it is no longer possible for the assignee to surrender. Thus, if he has already paid out a portion of the estate committed to him, in the form of counsel fees or other necessary or proper disbursements, or if he retained a portion of it as his own commission and has spent such sum and is unable to replace it, this is a good answer, so far as it goes, to a rule to show cause why he should not be adjudged in contempt for failure to pay over the money to the trustee in bankruptcy. For a court cannot by contempt proceedings undertake to compel the performance of something which the respondent is wholly unable to perform, even though he became so through his own fault or improvidence, where it arose through a mere misconception of his legal rights and duties.[41]

§ 440. Nature of Trustee's Title to Property Assigned.—The trustee in bankruptcy does not succeed the voluntary assignee in title or estate. His title is a wholly new one, founded alone on the provisions of the bankruptcy act, and not in any way connected with or dependent on the title vested in the assignee. And hence he does not take the estate subject to any preferences or priorities created by the deed of assignment or by the acts of the assignee.[42] But a title or lien acquired by the voluntary assignee, which would be to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but, upon

[39] In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9.

[40] Smith v. Belford, 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291; In re Banzai Mfg. Co., 183 Fed. 298, 105 C. C. A. 510, 25 Am. Bankr. Rep. 497; In re Manning, 123 Fed. 179, 10 Am. Bankr. Rep. 497.

[41] Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421; Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51, 5 Am. Bankr. Rep. 537; In re Klein, 116 Fed. 523, 8 Am. Bankr. Rep. 559; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; In re Banzai Mfg. Co., 183 Fed. 298, 105 C. C. A. 510, 25 Am. Bankr. Rep. 497.

[42] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Alexander v. Galt, 9 Fed. 149. Contra, under the act of 1867, see In re Beisenthal, 10 Ben. 42, 18 N. B. R. 120, Fed. Cas. No. 1,235; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408; In re Beadle, 5 Sawy. 351, Fed. Cas. No. 1,155; Reeser v. Johnson, 76 Pa. St. 313.

the order of the court of bankruptcy, it may be retained by the trustee for the benefit of the creditors.[43]

§ 441. **Estate Partly Settled by Assignee.**—Where an assignee, appointed in insolvency proceedings under a state law, or by a general deed of assignment, has taken charge of the debtor's property, sold it, and distributed the proceeds to creditors, acting in all respects in entire good faith and in conformity to the state law and the orders of the state court, and afterwards proceedings in bankruptcy against the assignor are had and a trustee appointed, the assignee is not to be held personally liable to the trustee in bankruptcy for the value of the property or its proceeds. In such a case the trustee "must seek his remedy against those who have received payments from the defendant in contravention of the bankruptcy act."[44] This rule holds good even if the assignee has paid out the money of the estate to creditors preferred by the deed of assignment. Their preferences may be unlawful under the bankruptcy law and voidable by the trustee, but the amount cannot be recovered from the assignee personally.[45] But the assignee must stop all administration of the estate immediately upon the appointment of a trustee in bankruptcy, or at least as soon as he receives notice. Thereafter the title is vested in the trustee, and the assignee holds the property remaining in his hands merely as an agent or bailee, and has no further duty with reference to it except as to mere safe keeping. At least it may be said that, after the filing of a petition in bankruptcy, a common-law assignee acts at his peril in carrying on the bankrupt's business, in selling it out or winding it up, or in doing anything beyond what is necessary to preserve such property as was in his hands when the petition was filed. Common-law assignments, it is true, are not outlawed by the Bankruptcy Act, and where the creditors allow the assignee to continue in possession and operate the business, he is not necessarily to be charged with a resulting loss, whether occurring before or after the filing of the petition in bankruptcy. But the burden is upon him to satisfy the bankruptcy court that in carrying on the business after the institution of bankruptcy proceedings he acted in good faith and with sound business judgment; and he may be held liable for a loss incurred by him in carrying on the business, where there is no finding that it was good judgment on his part to continue the business, and where he does not show what part of the loss was incurred before and what part after the filing of the petition in bankruptcy.[46] If, after

[43] In re Fish Bros. Wagon Co. (C. C. A.) 164 Fed. 553, 21 Am. Bankr. Rep. 149.

[44] Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; In re Walker, 18 N. B. R. 56, Fed. Cas. No. 17,063.

[45] Jones v. Kinney, 5 Ben. 259, 4 N. B. R. 649, Fed. Cas. No. 7,473.

[46] In re Karp (D. C.) 228 Fed. 798, 36 Am. Bankr. Rep. 414.

the trustee has demanded the surrender of the property, the assignee pays it out in the form of dividends to creditors, he is personally liable to replace it, and it is immaterial that the trustee did not sue out an injunction to restrain him from disposing of the estate, a mere demand for it being enough.[47]

§ 442. Rights of Purchasers from Assignee and Paid Creditors.—A sale of property by an assignee for the benefit of creditors to a purchaser in good faith for a valuable consideration conveys a title which will prevail against the claims of a trustee in bankruptcy of the assignor subsequently appointed, and the latter cannot recover the property from the purchaser.[48] But if there is no more than an uncompleted agreement for a sale, the purchaser not having made any payment on the property, it is avoided by the adjudication in bankruptcy and the trustee may claim the property.[49] So also, one who buys property from the assignee after the filing of the petition in bankruptcy and with knowledge thereof, cannot be called a purchaser in good faith, and he acquires no title superior to that of the trustee; but his equities in respect to the property or the money which he has paid for it may depend on many circumstances, and can be settled in the court of bankruptcy, which may, if necessary, bring in the assignee.[50] With regard to creditors who have received payment from the assignee, it may be remarked that if they were granted a preference by the terms of the assignment, and knew or had reasonable cause to believe, when receiving the money from the assignee, that it was in pursuance of the debtor's intention to prefer them, it is a clear case of a voidable preference under the bankruptcy law, and the trustee may force the restitution of the money so paid.[51] So also he may recover money disbursed in satisfaction of a lien of such a character as to be dissolved by the adjudication in bankruptcy.[52]

§ 443. Appointment of Assignee as Trustee.—Where one who has made an assignment for the benefit of creditors is afterwards adjudged bankrupt, it may be the wish of the creditors that the assignee should be appointed and serve as trustee in bankruptcy. There is no absolute rule of law to prevent this, and the assignee may be eminently well

[47] Ostrander v. Meunch, 2 McCrary, 267, 12 Fed. 562.

[48] Goldsmith v. Hapgood, Holmes, 454, Fed. Cas. No. 5,522.

[49] In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1. Mistake of a common-law assignee in selling personal property to which his assignor had no title does not impose any lien or trust in favor of the purchaser upon the proceeds in the hands of a subsequent trustee in bankruptcy. In re Goyette & Levigne (D. C.) 244 Fed. 638, 40 Am. Bankr. Rep. 109.

[50] Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623.

[51] In re Meyer, 2 N. B. R. 422, Fed. Cas. No. 9,515.

[52] Linder v. Lewis, 4 Fed. 318.

qualified to act as trustee in virtue of his special knowledge of the business or affairs of the bankrupt, or for other personal reasons. The court may therefore approve the election of the assignee as trustee by the creditors, under special circumstances, but will not ordinarily do so where he is accountable to the estate for money or property in his hands and also has a claim against it for compensation for his services as assignee or for disbursements made. "There is both a practical and a legal presumption against the propriety of such an appointment, for the reason that as assignee he is an accounting party to the estate, and as trustee will have to investigate his own account." [53] Such a person, however, may be appointed temporary receiver of the estate in bankruptcy. And if he turns over to himself, as such receiver, the funds in his hands as assignee, without retaining any sum therefrom as compensation for his past services, he submits both the fund and himself to the jurisdiction of the court of bankruptcy with respect to his right to an allowance for such services.[54]

§ 444. **Credits and Allowances to Assignee.**—When an assignee for the benefit of creditors is required to surrender the estate committed to him by the assignment, at the instance of a trustee in bankruptcy subsequently appointed, and in order that the property may be administered in bankruptcy, he is entitled to an allowance for the actual and necessary expenses incurred by him in collecting, caring for, and preserving the property from the time he took charge of it as assignee up to the date of the adjudication in bankruptcy.[55] Thus, where the assignee, during the time the property remained in his care, and before the adjudication in bankruptcy, collected bills due to the bankrupt, continued insurance on the property, arranged for guarding the same, collected outstanding goods, conducted correspondence, made an inventory, and incurred a liability for rent, it was held that he had a lien on the assets for these necessary disbursements.[56] So he should be reimbursed for money paid for rent of the premises and for wages paid to clerks, workmen, and servants,[57] and for taxes paid on the property, the same being a valid lien which the trustee would have had to discharge if the assignee had not done so,[58] and he may be allowed the costs and expenses of a sale of the property or a portion of it, if it

[53] In re Kellar (C. C. A.) 192 Fed. 830.

[54] In re Klein, 116 Fed. 523, 8 Am. Bankr. Rep. 559.

[55] In re Mays, 114 Fed. 600, 7 Am. Bankr. Rep. 764; In re Tatum, 112 Fed. 50, 7 Am. Bankr. Rep. 52; Burkholder v. Stump, 8 Phila. (Pa.) 172, 4 N. B. R. 597, Fed. Cas. No. 2,165; Wehl v. Wald, 18 Blatchf. 495, 6 Fed. 163; In re Pauly, 1 Nat. Bankr. News, 405. Compare In re Stubbs, 4 N. B. R. 376, Fed. Cas. No. 13,557.

[56] In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677.

[57] Elchholz v. Polack, 140 App. Div. 551, 125 N. Y. Supp. 1108.

[58] In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966.

appears that the sale was an advantageous one and beneficial to the estate.[59] The assignee may even be allowed reimbursement for expenses incurred by him after the adjudication in bankruptcy, provided they were incurred, and reasonably necessary, in the care and preservation of the property, though such expenditures will be strictly scrutinized. Thus, in the bankruptcy of a mercantile firm, which had previously made an assignment for the benefit of creditors, where there was an interval of some time between the adjudication and the appointment of a receiver by the court of bankruptcy, and meanwhile the assignee carried on the business, it was considered that he should be reimbursed for money paid to employees and for rent of the business premises paid during that period.[60]

But so far as regards the assignee's claim for compensation for his own personal services in connection with the assigned estate, there has been great difference of opinion. Some of the decisions, both under the present bankruptcy act and earlier acts, have maintained the theory that an assignment for creditors is at least constructively a fraud upon the bankruptcy law and that the assignee must be regarded as a participant in the fraud and therefore precluded from benefiting by it, so that the allowance to be made to him must be restricted to money out of pocket and cannot include any commissions or other remuneration for his own services.[61] But an equally respectable body of authorities repudiated this view, and held the assignee entitled to reasonable compensation for his time, care, and labor expended for the benefit of the assigned estate.[62] And the Supreme Court of the United States has finally declared that, if there was nothing inherently fraudulent or illegal in the assignment and the assignee was not a party to any actual fraud, he should not be deprived of compensation for his services rendered under the assignment, in so far as the same were beneficial to the estate, merely because of the fact that the assignment was an act of

[59] In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966; Clark v. Marx, 6 Ben. 275, Fed. Cas. No. 2,830; Jackson v. McCulloch, 1 Woods, 433, 13 N. B. R. 283, Fed. Cas. No. 7,140.

[60] In re Morris & Rice (D. C.) 258 Fed. 712, 44 Am. Bankr. Rep. 146.

[61] In re Congdon, 129 Fed. 478, 11 Am. Bankr. Rep. 219; In re Mays, 114 Fed. 600, 7 Am. Bankr. Rep. 764; In re Tatum, 112 Fed. 50, 7 Am. Bankr. Rep. 52; Wilbur v. Watson, 111 Fed. 493, 7 Am. Bankr. Rep. 54; In re Peter Paul Book Co., 104 Fed. 786, 5 Am. Bankr. Rep. 105; Stearns v. Flick, 103 Fed. 919, 4 Am. Bankr. Rep. 723; Hunker v. Bing, 9 Fed. 277; In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966; In re Stubbs, 4 N. B. R. 376, Fed. Cas. No. 13,557; In re Pauly, 1 Nat. Bankr. News, 405.

[62] In re Stewart, 179 Fed. 222, 102 C. C. A. 348; In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; In re Klein, 116 Fed. 523, 8 Am. Bankr. Rep. 559; In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163; Jackson v. McCulloch, 1 Woods, 433, 13 N. B. R. 283, Fed. Cas. No. 7,140; Catlin v. Foster, 1 Sawy. 37, 3 N. B. R. 540, Fed Cas. No. 2,519.

bankruptcy on which creditors could, if they chose, institute proceedings. The court pointed out that an assignment is not void from its inception, but only voidable in case proceedings in bankruptcy follow within four months; that the assignee acts lawfully in what he does before proceedings in bankruptcy are begun, and that, although the avoidance of the assignment by the adjudication in bankruptcy may relate back to the making of the assignment, still this mere fiction of relation is not enough to forbid an allowance to the assignee for beneficial services rendered before the adjudication; and added: "We are not prepared to go further than to allow compensation for services which were beneficial to the estate, beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen." [63]

The question of allowing compensation to attorneys for legal services rendered to the assignee stands upon the same basis. The claim of an attorney for fees for such services must be worked out through the assignee, and cannot be put higher than the assignee's claim for allowances. But in so far as professional services were beneficial to the estate, they are a proper subject for allowance. If the assignee has paid the attorney's fees, he may claim reimbursement; if not, the attorney may stand in his place and claim a lien on the assets for the reasonable value of his services.[64] But an attorney's charge for preparing the deed of assignment is not entitled to preference, though it may be proved as an unsecured claim against the bankrupt's estate.[65]

But neither the assignee nor his attorney will be entitled to claim any compensation for services or expenses rendered or incurred in unsuccessfully attempting to resist the adjudication in bankruptcy or in the endeavor to maintain his own title and possession.[66] Nor can

[63] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1. And see Macdonald v. Moore, 15 N. B. R. 26, Fed. Cas. No. 8,763; White v. Hill, 148 Mass. 396, 19 N. E. 407; Clark v. Sawyer, 151 Mass. 64, 23 N. E. 726; Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 South. 171, 28 L. R. A. 277. The state court may make allowances for compensation for services rendered under an assignment for the benefit of creditors, before the bankruptcy proceedings against the assignor were instituted, if the claim therefor is presented before the adjudication in bankruptcy. In re Bombino, 44 Utah, 141, 138 Pac. 1155.

[64] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214; In re Marble Products Co., 199 Fed. 668, 29 Am. Bankr. Rep. 384. Contra, see In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966; Eichholz v. Polack, 140 App. Div. 551, 125 N. Y. Supp. 1108.

[65] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1.

[66] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214; Clark v. Marx, 6 Ben. 275, Fed. Cas. No. 2,830.

the assignee be reimbursed for expenses or fees incurred by him in dealing with the assigned property after the date of the adjudication in bankruptcy,[67] nor for any items which will result in subjecting the estate to double charges for the same thing.[68]

As to the mode of enforcing the assignee's claim, it is held that he has a lien on the assets in his hands for his necessary expenses and for the value of his services which were beneficial to the estate, and is therefore entitled to a preference in payment.[69] If he submits himself to the jurisdiction of the court of bankruptcy, and that court makes an order requiring him to surrender to the trustee the assets in his hands, it may expressly except from the operation of the order such sums as he may be entitled to claim by way of credit or allowance.[70] Or if he is sued by the trustee in bankruptcy for the surrender of the estate, he may set off his claim for compensation and expenses against the amount demanded of him by the trustee.[71] But in respect to such credits and allowances, the assignee must be considered as occupying the position of an "adverse claimant." And therefore the court of bankruptcy has no jurisdiction to adjudicate the merits of his claim to retain out of the estate money disbursed by him, or which he claims on account of his commission as assignee, unless he consents to the exercise of such jurisdiction.[72]

[67] In re Solomon, 2 Nat. Bankr. News, 460.

[68] In re Kurth, 17 N. B. R. 573, Fed. Cas. No. 7,948; In re Kingman, 1 Nat. Bankr. News, 518.

[69] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677. Compare In re Lains, 16 N. B. R. 168, Fed. Cas. No. 7,989; In re Rogers, 116 Fed. 435, 8 Am. Bankr. Rep. 723.

[70] Neill v. Jackson, 8 Fed. 144.

[71] Catlin v. Foster, 1 Sawy. 37, 3 N. B. R. 540, Fed. Cas. No. 2,519.

[72] Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421; Galbraith v. Vallely, 255 U. S. —, 41 Sup. Ct. 415, 65 L. Ed. —, 46 Am. Bankr. Rep. 553.

CHAPTER XXIII

FRAUDULENT CONVEYANCES VOIDABLE BY TRUSTEE

§ 445. Statutory Provisions.—The bankruptcy act provides that the trustee in bankruptcy shall be vested by operation of law with "the title of the bankrupt" to "property transferred by him in fraud of his creditors."[1] Since the bankrupt himself has no title whatever to property transferred by him, though in fraud of creditors, it is evident that this clause is self-contradictory and without effect. But the subject is covered by other provisions of the statute which are more explicit and consistent. The sixty-seventh section contains the following language: "All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the

[1] Bankruptcy Act 1898, § 70a.

law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."[2] This evidently refers to such conveyances and transfers as would be fraudulent and voidable at common law and at the instance of creditors.

The same section contains the following further provision: "All conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [probably meaning the trustee in bankruptcy] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."[3] This is plainly meant to cover such conveyances and transfers as are denounced as fraudulent by the local statutory law, but which are not so at common law. Since both these provisions are found in a section of the act which bears the general heading "Liens," and since five of the six subdivisions of that section relate distinctly and exclusively to liens, properly so called, the natural reading of the language which we have quoted above would restrict it likewise to liens operating in fraud of creditors, as distinguished from transfers by deed or bill of sale. But in view of the broad terms employed ("conveyances, transfers, assignments, or incumbrances") the courts have felt constrained to give this part of the section a much wider scope than the general title of the section would warrant. But the conveyances or transfers intended by this part of the section are only such as are fraudulent either at common law or under the statutes of the state, as distinguished from those which are in fraud of the bankruptcy act itself.[4] It is further necessary to remark that, while both of the provisions quoted require that the conveyance, etc., shall have been made within four months prior to the filing of the petition in bankruptcy, the former (relating to conveyances fraudulent at common law) requires an intent and purpose on the part of the debtor to hinder or defraud his creditors, but not that he should have been insolvent at the time, whereas the latter cannot be brought into play unless the debtor was insolvent when the conveyance, etc., was made, but does not require any purpose on his part with reference to obstructing or defraud-

[2] Bankruptcy Act 1898, § 67e.
[3] Bankruptcy Act 1898, § 67e, in finem.
[4] Allen v. Montgomery, 48 Miss. 101, 10 N. B. R. 503; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1912A, 950.

ing creditors, but only that the particular transaction should be "held null and void as against the creditors" by the laws of the state.

Still another part of the statute provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value." [5] It might naturally be supposed that this clause was intended to add nothing to the description of conveyances and incumbrances which should be void or voidable under the act, but was merely meant as an explicit declaration concerning the trustee's right of action, namely, that he should be vested with the same right of action to avoid transfers and incumbrances which would be possessed by any creditor of the bankrupt if bankruptcy had not intervened. But it is significant that this clause omits all reference to the four-months' limitation. And consequently it is held that, if there be any kind of transfer of property which a creditor of the grantor might have avoided, though it was neither made with intent to delay or defraud creditors nor is denounced as void by the laws of the state, then the trustee in bankruptcy may avoid it, and without any regard to the time when it was made as compared with the date of bankruptcy.[6] But the effect of this clause is merely to vest the trustee with the same rights possessed by the creditor; it does not clothe him with any new or additional right in the premises over those possessed by the creditor, and he is subject to the same limitations and disabilities which would have beset the creditor in the prosecution of the action on his own behalf; and the rights of the parties are to be determined, not by any provisions of the Bankruptcy Act, but by the applicable principles of the common law or the laws of the state in which the right of action may arise.[7]

§ 446. Rights of Trustee as to Transfers.—With respect to the ownership of property in general, and so far as regards valid sales, liens, and incumbrances, the trustee merely succeeds to the title of the bank-

[5] Bankruptcy Act 1898, § 70e.

[6] Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957; Friedman v. Verchofsky, 105 Ill. App. 414; Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Thomas v. Fletcher, 153 Fed. 226, 18 Am. Bankr. Rep. 623; In re Toothaker Bros., 128 Fed. 187, 12 Am. Bankr. Rep. 99; In re Schenck, 116 Fed. 554, 8 Am. Bankr. Rep. 727; Irwin v. Maple, 252 Fed. 10, 164 C. C. A. 122, 41 Am. Bankr. Rep. 532; Neuburger v. Fells, 203 Ala. 142, 82 South. 172.

[7] Davis v. Willey (D. C.) 263 Fed. 588, 45 Am. Bankr. Rep. 348; Coleman v. Hagey, 252 Mo. 702, 158 S. W. 829.

rupt and has no stronger rights than he,[8] and if the filing of a petition in bankruptcy were merely an appropriation by the bankrupt of his property for the payment of his debts, like a common-law assignment, the trustee would be equally bound with the bankrupt in respect to prior conveyances and transfers made in fraud of creditors.[9] But by the express terms of the act, the trustee represents creditors, succeeds to their rights, and is invested with the same rights of action which they would have had (if bankrupcy had not intervened) concerning any such conveyances or transfers.[10] It follows that the trustee in bankruptcy may, by proper proceedings, avoid or annul any transfer made by the bankrupt which any creditor might have attacked by similar proceedings.[11] In fact, the trustee occupies exactly as strong a position, and especially since the amendment of 1910, as a creditor who has levied an attachment or one who holds a judgment or an unsatisfied execution,[12]

[8] In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259.

[9] At common law, the right of a creditor to attack and set aside a conveyance made by his debtor, on the ground of fraud, does not pass to an assignee or trustee appointed by the debtor. It will not pass to an assignee for the benefit of creditors, unless by force of some statute of the state. Sandwich Mfg. Co. v. Wright, 22 Fed. 631; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442.

[10] In re Lukens, 138 Fed. 188, 14 Am. Bankr. Rep. 683; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442; In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. Supp. 1014; In re Grocers' Baking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150. The fact that, long before the institution of bankruptcy proceedings, there were creditors who were entitled under the state law to attack a particular transfer or conveyance by their debtor, as being fraudulent as to them, though not fraudulent as to subsequent creditors, does not give those creditors any priority in the bankruptcy proceedings, nor prevent the application of the provision of the Bankruptcy Act for the dissolution of liens obtained within four months; the trustee in bankruptcy succeeds to the rights of all the creditors in such matters. Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162.

[11] Sanborn-Cutting Co. v. Paine, 244 Fed. 672, 157 C. C. A. 120, 40 Am. Bankr. Rep. 525; In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420; Wright v. H. B. Ehrlich & Co., 146 Ga. 400, 91 S. E. 412; Beasley v. Smith, 144 Ga. 377, 87 S. E. 293; Albert Pick & Co. v. Natalby, 211 Ill. App. 486; Blake v. Thwing, 185 Ill. App. 187; Gregory v. Binghamton Trust Co., 168 App. Div. 805, 154 N. Y. Supp. 376; Bronaugh v. Evans, 204 Ala. 153, 85 South. 556; Ignatius v. Farmers' State Bank (C. C. A.) 272 Fed. 33, 47 Am. Bankr. Rep. 42; Minott v. Johnson (Me.) 113 Atl. 464; Durrett v. Harris (Ark.) 228 S. W. 386; Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Cox v. Wall, 132 N. C. 730, 44 S. E. 635; Landis v. McDonald, 88 Mo. App. 335; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412; Earle v. National Metallurgic Co., 77 N. J. Eq. 17, 76 Atl. 555; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489; In re Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224; Everett v. Stone, 3 Story, 446, Fed. Cas. No. 4,557; Bradshaw v. Klein, 2 Biss. 20, 1 N. B. R. 542, Fed. Cas. No. 1,790; In re Metzger, 2 N. B. R. 355, Fed. Cas. No. 9,510; In re Leland, 7 Ben. 156, 9 N. B. R. 209, Fed. Cas. No. 8,230; In re Leland, 10 Blatchf. 503, Fed. Cas. No. 8,234.

[12] In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; Bunnell v. Bronson, 78 Conn. 679, 63 Atl.

and he may maintain a suit to set aside any fraudulent conveyance, made within four months before the filing of the petition in bankruptcy, which could have been attacked by creditors in that position,[12] although the particular transaction would have been valid and binding as between the immediate parties to it,[14] so that the bankrupt himself could not have sustained an action to recover the money or property, vacate the conveyance, or otherwise annul his own act.[15] But more than this, the act provides (§ 67e) that property conveyed in fraud of creditors shall "be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee," and also (§ 70a) that the trustee shall be vested with title to property conveyed by the bankrupt in fraud of his creditors. As to such property, therefore, the trustee is not merely a successor to the rights of defrauded creditors, but he is invested with the title,[16] and may sue to vacate or avoid any fraudulent transfer of the bankrupt's property, whether or not there is any creditor armed with a lien or otherwise in position to attack such transfer,[17] and a bill by the trustee for this purpose should be maintained in his own name as

396; Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887; In re Carpenter, 125 Fed. 831, 11 Am. Bankr. Rep. 147. Since an execution creditor may maintain an action of trespass on the case against persons who have fraudulently conspired to secrete and transfer the property of the debtor, such an action may be maintained by the debtor's trustee in bankruptcy subsequently appointed, by virtue of the amendment of 1910 giving him the rights and remedies of an execution creditor. Sattler v. Slonimsky, 199 Fed. 592, 28 Am. Bankr. Rep. 729.

[13] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; In re Ricketts, 234 Fed. 285, 148 C. C. A. 187, 37 Am. Bankr. Rep. 124; Winslow v. Staab, 233 Fed. 305, 36 Am. Bankr. Rep. 626; Riggs v. Price, 277 Mo. 333, 210 S. W. 420; Park v. South Bend Chilled Plow Co. (Tex. Civ. App.) 199 S. W. 843; Grand Rapids Trust Co. v. Nichols, 199 Mich. 126, 165 N. W. 667; Miley v. Heaney, 169 Wis. 58, 169 N. W. 64; Schmitt v. Dahl, 88 Minn. 506, 93 N. W. 665, 67 L. R. A. 590; Adams' Assignee v. Branch, 3 Ky. Law Rep. 178; McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836. A corporation's trustee in bankruptcy has capacity to contest the validity of a mortgage covering the bankrupt's real and personal property. Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, 30 Am. Bankr. Rep. 665. The trustee in bankruptcy of a corporation is entitled to maintain a bill to set aside transfers of property by the corporation to one of its directors as in fraud of its creditors. Henderson v. Garner, 200 Ala. 59, 75 South. 387.

[14] Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174; Crooks v. Stuart, 2 McCrary, 13, 7 Fed. 800; Mann v. Flower, 25 Minn. 500.

[15] Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314; Bennett v. Ætna Ins. Co., 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414; Carr v. Gale, 3 Woodb. & M. 38, Fed. Cas. No. 2,435.

[16] Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. Supp. 80; Annis v. Butterfield, 99 Me. 181, 58 Atl. 898; Starks v. Curd, 88 Ky. 164, 10 S. W. 419; In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; Mann v. Flower, 25 Minn. 500; Neuburger v. Felis, 203 Ala. 142, 82 South. 172; Barrett v. Kaigler, 200 Ala. 404, 76 South. 320; Buttz v. James, 33 N. D. 162, 156 N. W. 547; Ernest Wolff Mfg. Co. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396.

[17] Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015. See also Faulkner v. Kaplon, 203 Fed. 114. Compare Coleman v. Hagey (Mo.) 158 S. W. 829. This provision of the Bankruptcy Act vests in the trustee title to all property transferred by the bankrupt at any time, in fraud of creditors existing at the

trustee, and not in the name of the bankrupt or of any creditor.[18] But as it is the duty of a trustee in bankruptcy to represent the unsecured creditors, he is not entitled to sue to annul a conveyance merely as given in fraud of a creditor who has a lien on the property.[19] Nor can the trustee complain of the fraudulent character of a mortgage given by a purchaser from the bankrupt to a third person, unless he can impeach the sale from the bankrupt to the purchaser on other grounds.[20]

§ 447. **Election by Trustee.**—It is not the imperative duty of a trustee in bankruptcy to reclaim and attempt to recover all the property alleged to have been conveyed away by the bankrupt in fraud of his creditors. There may be circumstances rendering the necessary litigation so costly, protracted, and doubtful that the ultimate benefit to the estate might be very small. In such cases he may elect to claim the property and proceed for its recovery or not to do so, and if he does not elect to take it within a reasonable time, it is deemed an election to reject it.[21] And if he has once elected not to attempt to set aside a conveyance or transfer by the bankrupt, he cannot afterwards come into equity to attack it.[22] Thus, where a debtor, within four months before his bankruptcy, sold and assigned certain accounts to a third person, and his trustee, with full knowledge of the facts, applied for and obtained an order from the court of bankruptcy requiring the bankrupt to turn over a part of the proceeds of the sale which had not been accounted for, such action of the trustee was held an election to affirm the sale and he could not thereafter maintain a petition against the assignee to recover the accounts, on the ground that the sale was fraudulent.[23]

§ 448. **Trustee's Right of Action Exclusive.**—The provisions of the bankruptcy law relating to fraudulent conveyances by the bankrupt have the effect, not only to vest in the trustee in bankrutpcy the right to maintain actions for the avoidance of such conveyances, but also to take away that right from creditors. After the adjudication in bankruptcy and the appointment of a trustee,[24] no creditor has the right to institute legal proceedings to set aside a transfer or conveyance alleged to have been fraudulent, as that right pertains to the trustee alone.[25] And the adjudi-

time of the bankruptcy. Barrett v. Kaigler, 200 Ala. 404, 76 South. 320.

[18] Exchange Nat. Bank v. Stewart, 158 Ala. 218, 48 South. 487.

[19] Cowan v. Staggs (Ala.) 59 South. 153.

[20] Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119.

[21] Nash v. Simpson, 78 Me. 142, 3 Atl. 53. And see supra, §§ 282, 283, 321.

[22] Laughlin v. Calumet & C. Canal & Dock Co., 65 Fed. 441, 13 C. C. A. 1. And see Greenhall v. Carnegie Trust Co., 180 Fed. 812, 25 Am. Bankr. Rep. 300.

[23] Thomas v. Sugerman (C. C. A.) 157 Fed. 669, 19 Am. Bankr. Rep. 509.

[24] As to the right of creditors to institute such an action after the adjudication in bankruptcy, but before any trustee has been appointed, see Guaranty Title & Trust Co. v. Pearlman, 144 Fed. 550, 16 Am. Bankr. Rep. 461.

[25] Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U.

cation in bankruptcy and appointment of a trustee constitute a complete defense to a creditor's bill filed for such a purpose in a state court.[26] Further, the refusal or failure of the trustee in bankruptcy to sue for the avoidance of an alleged fraudulent conveyance within the time prescribed by law, or at all, does not transfer the right to any creditor or to the creditors generally, nor authorize them to sue in their own behalf.[27] The remedy of creditors who are dissatisfied with the refusal or inactivity of the trustee is to apply to the court of bankruptcy for an order directing the trustee to institute the necessary proceedings. If the court is satisfied that such action should be taken and will probably result in benefit to the estate, it has power to require the trustee to proceed,[28] though, in doubtful cases, the creditors who insist on the suit being brought may be required to indemnify the trustee against the costs and expenses.[29]

§ 449. Conditions Precedent to Trustee's Action.—Since the bankruptcy law vests the trustee with title to all property conveyed by the bankrupt in fraud of creditors, he may proceed to recover such property notwithstanding the fact that there may be, at the time, no creditor who has put his claim in judgment and thus placed himself in a position to assail the transfer as fraudulent. The trustee's title "accrues by force of the act, and not through the right of the creditor to assert the fraud." [30] Moreover, the bankruptcy law makes it impossible for creditors to re-

S. 20, 25 L. Ed. 43; Wright v. H. B. Ehrlich & Co., 146 Ga. 400, 91 S. E. 412; Kimbrough v. Alred, 202 Ala. 413, 80 South. 617; McMahon v. Pithan, 167 Iowa, 498, 147 N. W. 920; Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493, 51 Atl. 454; In re Gray, 47 App. Div. 554, 62 N. Y. Supp. 618; Elder's Ex'rs v. Harris, 76 Va. 187; Bolling v. Munchus, 59 Ala. 482; Thurmond v. Andrews, 10 Bush (Ky.) 400, 13 N. B. R. 157; Anderson v. Anderson, 80 Ky. 638; Allen v. Montgomery, 48 Miss. 101, 10 N. B. R. 503; Goodwin v. Sharkey, 5 Abb. Prac. N. S. (N. Y.) 64, 3 N. B. R. 558; Scott v. Devlin, 89 Fed. 970; In re Lowe, 19 Fed. 589; New Orleans Nat. Banking Ass'n v. Le Breton, 14 Fed. 646; Allen v. Massey, 1 Dill. 40, 4 N. B. R. 248, Fed. Cas. No. 231. Contra, see Board of Directors v. Lowrance, 111 S. C. 295, 97 S. E. 830. As to suits begun by creditors more than four months before the bankruptcy, the right to continue them after the appointment of a trustee, and the preference gained by the suing creditors, see Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919.

[26] Leseure v. Weaver, 108 Ill. App. 616.

[27] Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929. Compare Bates v. Bradley, 24 Hun (N. Y.) 84.

[28] Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836; Freelander v. Holloman, 9 N. B. R. 331, Fed. Cas. No. 5,081. See Casey v. Baker (D. C.) 212 Fed. 247, 32 Am. Bankr. Rep. 311, holding that it is the trustee's duty, if properly indemnified, to sue to set aside fraudulent transfers, and if he refuses, an interested party may sue in his own name, making the trustee a defendant, or may be permitted to sue in the trustee's name.

[29] See supra, § 283.

[30] Platt v. Matthews, 10 Fed. 280. A trustee may maintain a suit to recover property fraudulently conveyed without

duce their claims to judgment after the adjudication, although this is usually necessary as a condition precedent to the right to avoid a fraudulent conveyance, or even that the creditor should hold an execution returned unsatisfied.[31] But the trustee occupies the position of an execution creditor, and hence it is not a pre-requisite to his right to institute proceedings for such purpose, nor a condition to his action, that judgments at law should have been obtained upon the claims of the creditors in whose behalf the equitable remedy is invoked.[32] Nor is any demand necessary before the commencement of an action by the trustee to recover property unlawfully transferred by the bankrupt,[33] neither is he bound to tender to the purchaser the amount which the latter may have paid to the bankrupt.[34] But the trustee is bound to show some actionable injury to himself, or rather to the estate which he represents, and therefore an action will not lie to avoid an alleged fraudulent sale of personal property, where the goods have already been seized under a warrant in bankruptcy and turned over to the trustee, whose possession is undisputed.[35]

§ 450. **Same; Proof of Debts and Insufficiency of Assets.**—In a suit to set aside a fraudulent conveyance or transfer, the trustee must be prepared to show that there were creditors of the bankrupt at the time of the alleged fraud, except in those cases where the transaction may be regarded as fraudulent with respect to subsequent creditors.[36] Also he must allege and show that there are proved and allowed claims against the estate in bankruptcy, or at least provable debts, at the time of bringing the suit, for otherwise there would be no one for him to represent and a recovery would simply inure to the benefit of the bankrupt himself, which is not the purpose of the act.[37] Hence, if the creditors pur-

proving injury or first obtaining judgment on his claim. Davis v. Gates (D. C.) 235 Fed. 192, 37 Am. Bankr. Rep. 818.

[31] Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Riker v. Gwynne, 116 N. Y. Supp. 10.

[32] Mitchell v. Mitchell, 147 Fed. 280, 17 Am. Bankr. Rep. 382; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Crary v. Kurtz, 132 Iowa, 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549; Beasley v. Coggins, 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801; Hobbs v. Frazier, 61 Fla. 611, 55 South. 848; Hood v. Blair State Bank, 3 Neb. (Unof.) 432, 91 N. W. 701; Ryan v. Rogers, 14 Idaho, 309, 94 Pac. 427; Cragin v. Carmichael, 2 Dill. 519, 11 N. B. R. 511, Fed. Cas. No. 3,319; Baldwin v. Kingston (D. C.) 247 Fed. 163, 40 Am. Bankr. Rep. 641; Riggs v. Price, 277 Mo. 333, 210 S. W. 420. It is not even necessary for the trustee, before suing to set aside fraudulent transfers, to wait for the formal allowance of creditors' claims in the bankruptcy proceedings, if they have been presented and filed. Brewer v. Brown, 268 Ill. 562, 109 N. E. 264.

[33] Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707.

[34] Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669.

[35] Smith v. Claflin, 19 N. B. R. 523, Fed. Cas. No. 13,026.

[36] Union Trust Co. v. Amery, 67 Wash. 1, 120 Pac. 539; Cobb v. First Nat. Bank (D. C.) 263 Fed. 1000, 45 Am. Bankr. Rep. 48.

[37] Crary v. Kurtz, 132 Iowa, 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St.

porting to be represented in the action by the trustee have failed to present their claims for allowance within the time required by the statute, and are therefore barred from participation in the estate, the action cannot be maintained.[38] Such a suit may be prosecuted for the sole benefit of one person, if he is the only creditor of the bankrupt,[39] but not where that creditor has so conducted himself with reference to the transaction in suit as to estop himself from alleging its fraudulent character.[40] Further, and to put himself in a position analogous to that of a creditor holding an execution returned unsatisfied, the trustee must aver that the assets of the estate in his hands are not sufficient to satisfy the claims filed against it,[41] though it is said that this is not necessary where the bankrupt states in his petition or schedule that he has no assets.[42]

§ 451. **Nature and Form of Transaction.**—Under the broad and comprehensive language of the statute, relating to "conveyances, transfers, assignments, or incumbrances" of property, it may be stated in the most general terms that any disposition of real or personal property by a debtor which would have been void as against his creditors, as being fraudulent at common law or under the statutes of the state, if no petition in bankruptcy had been filed against him, will be equally void as against creditors represented by his trustee in bankruptcy.[43] And first, one may lawfully sell any part of his property for a present fair consideration, even though he is insolvent, and the transfer will not be voidable in bankruptcy, if the laws of the state were complied with in respect to delivery and other such requisites,[44] and there was no intent to place the property beyond the reach of creditors. But a transfer of property for a past consideration, or in discharge of an unsecured debt, will gen-

Rep. 549; Leavengood v. McGee, 50 Or. 233, 91 Pac. 453; Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223. See Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957. Compare Donegan v. Davis, 66 Ala. 362.

[38] Cartwright v. West, 173 Ala. 198, 55 South. 917.

[39] Level Land Co. v. Sivyer, 112 Wis. 442, 88 N. W. 317.

[40] Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612.

[41] Knapp v. Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610; Prescott v. Galluccio, 164 Fed. 618, 21 Am. Bankr. Rep. 229; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Flint v. Chaloupka, 81 Neb. 87, 115 N. W. 535; Shelly v. Nolen, 38 Tex. Civ. App. 343, 88 S. W. 524; McKey v. Smith, 255 Ill. 465, 99 N. E. 695; Hibschman v. Bevis, 103 Wash. 317, 174 Pac. 5. Compare Entwisle v. Cohen, 141 App. Div. 834, 125 N. Y. Supp. 935.

[42] In re Schoenfield, 190 Fed. 53, 27 Am. Bankr. Rep. 64.

[43] Bankruptcy Act 1898, §§ 67e, 70e. And see Union Trust & Sav. Bank v. Amery, 72 Wash. 648, 131 Pac. 199; In re Wynne, Chase, 227, 4 N. B. R. 23. Fed. Cas. No. 18,117; In re Morrill, 2 Sawy. 356, 8 N. B. R. 117, Fed. Cas. No. 9,821; Smith v. Ely, 10 N. B. R. 553, Fed. Cas. No. 13,044; Blake v. Thwing, 185 Ill. App. 187.

[44] In re Ozark Cooperage & Lumber Co., 180 Fed. 105, 103 C. C. A. 603, 24 Am. Bankr. Rep. 835; Burnes v. Epstein, 201 Fed. 393. And see Meyer v. Perkins, 20 Cal. App. 661, 130 Pac. 206. The mere fact that the defendant, having purchased property from the bankrupt, got it at a bargain price or for much less than its actual value, is not

erally be voidable either as a preference or as a fraud on the creditors.[45] So where a pretended sale is merely colorable, and amounts to no more than a device to put the apparent title in a third person while the debtor remains the real owner,[46] or where a chose in action is assigned to a third person, without any consideration, but merely that he may collect the money and hand it to the bankrupt,[47] or where the sale includes the fixtures and furniture and the lease of the debtor's place of business, and so deprives him of the means of continuing his business,[48] or where a voluntary settlement by a debtor effects the payment of debts and contingent liabilities existing at the time, but by means of contracting other obligations which afterwards result in his insolvency.[49]

Again, trustees in bankruptcy very frequently find the wife of the bankrupt in the possession and apparent ownership of considerable property, which is not satisfactorily accounted for. Undoubtedly a wife is entitled to all she obtains from sources independent of her husband, and cannot be molested therein by his creditors.[50] And she may honestly acquire property directly from him, if she gives an adequate consideration. But the peculiar relation of the parties offers a special temptation to an insolvent or embarrassed man who is seeking the means to evade the just demands of his creditors and place property beyond their reach. Hence a transfer of property by a debtor to his wife, either directly or through an intermediary, should be carefully scrutinized, and it will be voidable at the instance of his trustee in bankruptcy if found to have been without consideration and in contemplation of insolvency, or merely colorable, the wife taking the record title, but the husband retaining all the fruits of ownership and the power of disposition.[51]

enough to warrant setting aside the sale as fraudulent, since mere inadequacy of price is not alone a proof of fraud. Klein v. Gallin, 141 N. Y. Supp. 831.

[45] Carpenter v. Karnow, 193 Fed. 762, 28 Am. Bankr. Rep. 21; Greenhall v. Carnegie Trust Co., 180 Fed. 812, 25 Am. Bankr. Rep. 300; In re Connelly, 204 Fed. 479, 30 Am. Bankr. Rep. 340; Raley v. Raymond Bros. Co., 73 Neb. 496, 103 N. W. 57; In re Ansley Bros., 153 Fed. 983, 18 Am. Bankr. Rep. 457. But where a debtor, shortly before his bankruptcy, conveys real and personal property which he had previously sold and for which he had received payment, but had not yet conveyed, the conveyance is not void, although the debtor knew that he was insolvent, as the title to such propery was merely held by him in trust for the purchaser. Steadman v. Caswell, 2 Hask. 375, Fed. Cas. No. 13,330a.

[46] In re Siegel, 164 Fed. 559, 21 Am. Bankr. Rep. 154; Visanska v. Cohen, 165 Fed. 552, 21 Am. Bankr. Rep. 350; In re Irwin (D. C.) 268 Fed. 162, 46 Am. Bankr. Rep. 288.

[47] O'Sullivan's Trustee v. Douglass, 98 S. W. 990, 30 Ky. Law Rep. 366. An advancement made to enable the bankrupt to keep in business long enough to prevent the avoidance of prior preferences is a fraud on the Bankruptcy Act, so that the trustee can recover property assigned in consideration of the advancement. Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718.

[48] Brooks v. D'Orville, 7 Ben. 485, Fed. Cas. No. 1,951.

[49] Spaulding v. McGovern, Fed. Cas. No. 13,218.

[50] In re Eldred, 3 N. B. R. 256, Fed. Cas. No. 4,328.

[51] Henkel v. Seider, 163 Fed. 553, 20 Am. Bankr. Rep. 773; In re Smith, 100

For somewhat similar reasons, the courts have often denounced the scheme by which an embarrassed merchant or manufacturer procures the organization of a corporation, to which he transfers his stock and property, ostensibly as his successor in business, but which is really conducted thereafter solely for his own benefit, the purpose being to delay and defraud his creditors by interposing an apparently new ownership between the property and their claims. Such a transfer is voidable in bankruptcy.[52] But it is otherwise where the creditors themselves engineer the formation of the corporation, or cause it to be operated for their benefit, rather than for that of the debtor.[53]

Again, one may take a mortgage or other security upon the property of an insolvent or failing debtor, and maintain it as against his trustee in bankruptcy, provided full and present consideration was given and there was no knowledge of an intent to defraud or to give a preference.[54] Nor is the enforcement of an existing mechanic's lien necessarily invalid as against subsequent proceedings in bankruptcy,[55] nor a transaction the effect of which is merely to render specific a previously existing general lien,[56] or to convert alimony due and accruing under a decree of court into an annuity for life secured by a duly recorded mortgage of specific property.[57] But a mortgage or other security newly given for a debt past due is generally voidable in bankruptcy, either as a preference or as a fraud on the other creditors.[58] And even giving present

Fed. 795, 3 Am. Bankr. Rep. 95; In re Wood, 5 Fed. 443; Fisher v. Henderson, 8 N. B. R. 175, Fed. Cas. No. 4,820; Lawrence v. Graves, 5 N. B. R. 279, Fed. Cas. No. 8,138; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. Supp. 372; Breschemier v. Houston (Iowa) 96 N. W. 756; In re Eldred, 3 N. B. R. 256, Fed. Cas. No. 4,328; Jackson v. Jetter (Iowa) 142 N. W. 431; Block v. Academy Ball Room, Inc. (D. C.) 221 Fed. 1004, 34 Am. St. Rep. 675; Milkman v. Arthe (D. C.) 213 Fed. 642.

[52] In re Berkowitz, 173 Fed. 1013, 22 Am. Bankr. Rep. 233; In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. 511; In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769; Ludvigh v. American Woolen Co., 159 Fed. 796, 19 Am. Bankr. Rep. 795; Foster v. Hip Lung Ying Kee & Co., 243 Ill. 163, 90 N. E. 375. See In re L. M. Alleman Hardware Co., 158 Fed. 119, 19 Am. Bankr. Rep. 765; In re Jamaica Slate Roofing & Supply Co., 200 Fed. 460; Hane v. Crown & Keystone Co. (D. C.) 223 Fed. 439, 35 Am. Bankr. Rep. 175; Osborn v. Peace (D. C.) 215 Fed. 181.

[53] In re A. L. Robertshaw Mfg. Co., 133 Fed. 556, 13 Am. Bankr. Rep. 409.

[54] Grinstead v. Union Savings & Trust Co., 190 Fed. 546, 111 C. C. A. 398, 27 Am. Bankr. Rep. 123; Lindley v. Ross, 200 Fed. 733, 29 Am. Bankr. Rep. 610; First Nat. Bank v. Haverkampf, 16 N. M. 497, 121 Pac. 31. See, supra, § 366 et seq. A conveyance of property by a bankrupt to a mortgagee in payment of that and other valid liens is not voidable in the bankruptcy proceedings. Meservey v. Roby, 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529.

[55] Fehling v. Goings, 67 N. J. Eq. 375, 58 Atl. 642. See supra, § 374.

[56] Duplan Silk Co. v. Spencer, 115 Fed. 689, 53 C. C. A. 321, 8 Am. Bankr. Rep. 367.

[57] Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599.

[58] Johnstone v. Babb, 240 Fed. 668, 153 C. C. A. 466, 38 Am. Bankr. Rep 715; MacHenry v. Dwelling Building & Loan Ass'n, 259 Fed. 880, 44 Am. Bankr. Rep. 234; In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154; In re Salvator Brewing Co., 183 Fed. 910, 25 Am. Bankr. Rep. 536;

consideration will not always save it. For a temporary loan at exorbitant interest, upon the conveyance of the insolvent borrower's whole assets, is a fraud on the bankruptcy law and therefore void.[59] The same is true of a mortgage given by a corporation to secure the personal indebtedness of its principal stockholder,[60] or one which lacks the consent of the necessary proportion of the stockholders, as provided by the state statute.[61] And a chattel mortgage comes within the terms of the bankruptcy law, and may be avoided by the trustee, if fraudulent and void as against creditors, whether for failure to record, or because there was no change of possession, or the mortgagor was not bound to account for sales, or for other reasons.[62] And so of a pledge of personal property as security for the payment of an existing debt, disguised as a bill of sale with a separate instrument of defeasance without change of possession.[63]

Bradley v. Farwell, Holmes, 433, Fed. Cas. No. 1,779; Bradley v. Converse, 4 Cliff. 375, Fed. Cas. No. 1,776; Durack v. Wilson, 46 Misc. Rep. 237, 94 N. Y. Supp. 232; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462. That a renewal of a chattel mortgage may be invalid as against the trustee in bankruptcy of the debtor, see Scott v. One Thousand Island Boat & Engine Co., 134 N. Y. Supp. 150. A mortgage of all the mortgagor's property to secure overdue notes representing moneys advanced to take up other notes for the mortgagor, the latter bearing indorsements which were alleged to have been forged, must be deemed a conveyance made to hinder or defraud creditors, so as to be voidable by the mortgagor's trustee in bankruptcy. Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, 38 Am. Bankr. Rep. 664. Where the majority stockholder of a corporation, with knowledge of its precarious financial condition, agreed to sell to the corporation its own stock of a par value of $5,100 for $2,000, receiving $500 in cash and notes secured by a deed of trust covering all the corporation's assets for the balance, the transaction was fraudulent as against the corporation's creditors and void as against its trustee in bankruptcy. M. V. Moore & Co. v. Gilmore, 216 Fed. 99, 132 C. C. A. 343.

[59] Brooks v. Davis, Fed. Cas. No. 1,950.

[60] American Wood Working Machinery Co. v. Norment (C. C. A.) 157 Fed. 801, 19 Am. Bankr. Rep. 679.

[61] In re Eagle Steam Laundry Co., 176 Fed. 740, 23 Am. Bankr. Rep. 859.

[62] In re Geiver, 193 Fed. 128, 28 Am. Bankr. Rep. 413; Egan State Bank v. Rice, 119 Fed. 107, 56 C. C. A. 157, 9 Am. Bankr. Rep. 437; In re Platts, 110 Fed. 126, 6 Am. Bankr. Rep. 568; Kappner v. St. Louis & St. J. R. Ass'n, 3 Dill. 228, Fed. Cas. No. 7,612; In re Leland, 10 Blatchf. 503, Fed. Cas. No. 8,234; In re Jaconson & Perrill, 200 Fed. 812, 29 Am. Bankr. Rep. 603; Johnson v. Dismukes, 204 Fed. 382, 29 Am. Bankr. Rep. 686; In re Raney, 202 Fed. 996. Compare In re Durham, 114 Fed. 750, 8 Am. Bankr. Rep. 115. See supra, § 367. And see also In re Purtell (D. C.) 215 Fed. 191; Peterson v. Sabin, 214 Fed. 234, 130 C. C. A. 608, 32 Am. Bankr. Rep. 599; In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 33 Am. Bankr. Rep. 618; In re F. H. Saunders & Co., 272 Fed. 1003, 47 Am. Bankr. Rep. 117; Zehner v. Southern Surety Co., 272 Fed. 954, 47 Am. Bankr. Rep. 132; General Securities Co. v. Driscoll (C. C. A.) 271 Fed. 296; In re Pine Tree Lumber Co. (C. C. A.) 269 Fed. 515, 46 Am. Bankr. Rep. 463; In re Bonk (D. C.) 268 Fed. 1012, 46 Am. Bankr. Rep. 389.

[63] In re Groezinger (D. C.) 199 Fed. 935, 28 Am. Bankr. Rep. 732. See In re American Fibre Reed Co. (D. C.) 206 Fed. 309, 30 Am. Bankr. Rep. 223; Home Bond Co. v. McChesney, 210 Fed. 893, 127 C. C. A. 552; Petition of National Discount Co. (C. C. A.) 272 Fed. 570, 47 Am. Bankr. Rep. 12.

Money also is property within the meaning of the law, and its transfer may be fraudulent as against creditors. Thus, where the owner of all the stock of a trading corporation, when it was indebted and within four months prior to the filing of a petition in bankruptcy against it, transferred the greater part of its bank deposit, which constituted practically its sole assets, to himself in payment of alleged claims, leaving not enough to pay other claims, it was held that the transaction constituted not only a preference, but also a transfer with intent to hinder and defraud creditors.[64] So, where the bankrupt, who was the owner of a business corporation, at a time when it was desperately involved, diverted revenues of its business for his own benefit and that of others by overpayments for services, exorbitant hire of teams, and other expenses, his trustee in bankruptcy was held entitled to reach such money and property in the hands of those benefited.[65] So where one who knows himself to be insolvent makes a payment on a debt barred by the statute of limitations, the resulting implied promise to pay the remainder of the outlawed debt is an "incumbrance" which may be avoided by the trustee in bankruptcy, since its effect is to defeat the defense of limitations, and that is a valuable right which passes to his creditors in bankruptcy.[66] On similar principles, where property is purchased by a man with his own money, but, by his direction or procurement, the conveyance is made to his wife and the title vested in her, it may properly be said, within the meaning of the bankruptcy law, that the money so paid by him is "transferred," and if this is done in fraud of his creditors, the title to the fund will pass to his trustee in bankruptcy, and the land, as representing it, may be subjected to the administration of the estate.[67] And of course the rule is the same when any third person, other than the bankrupt's wife, is made the cover to receive the title, the bankrupt furnishing the money.[68] But one may loan money to his wife to enable her to purchase real estate, and if the loan is repaid before the institution of bankruptcy proceedings against the husband, the land cannot be taken from the wife or impressed with a trust for the husband's creditors.[69] It may also be a fraudulent "transfer" of property, within the meaning of the statute, when funds are diverted by an insolvent debtor from the claims of his creditors and invested in a homestead,[70] or when a payment to a creditor covers not

[64] Boston West Africa Trading Co. v. Quaker City Morocco Co. (C. C. A.) 261 Fed. 665, 44 Am. Bankr. Rep. 315.

[65] Kimbrough v. Alred, 202 Ala. 413, 80 South. 617.

[66] In re Salmon (D. C.) 239 Fed. 413, 38 Am. Bankr. Rep. 692.

[67] Platt v. Mead, 9 Fed. 91; In re Meyers, 2 Ben. 424, 1 N. B. R. 581, Fed. Cas. No. 9,518; In re Schonberg, 7 Ben. 211, Fed. Cas. No. 12,477.

[68] Hyde v. Cohen, 11 N. B. R. 461, Fed. Cas. No. 6,967; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612.

[69] Clark v. Else, 21 S. D. 112, 110 N. W. 88.

[70] Painter v. Napoleon Township, 190 Fed. 637, 26 Am. Bankr. Rep. 324; John-

only existing debts but also the amount of a note not yet due.[71] But a set-off by a bank of a deposit account due to a bankrupt against his liability to the bank on a note is not a "transfer of property" by the bankrupt.[72] A gift of money or property of considerable value by a husband to his wife is in fraud of his creditors, and recoverable by his trustee in bankruptcy, if made while he was insolvent and in contemplation of the bankruptcy which shortly followed,[73] and this includes payments made by him on policies of insurance on his own life for the wife's benefit.[74]

So again, a debtor may "transfer" his property to another by voluntarily confessing judgment in favor of such other and allowing him to issue execution and make a levy and sale resulting in his becoming the purchaser.[75] But the plaintiff in a pending suit has the right to abandon or settle the contest at any stage, at his election, and on his subsequent adjudication as a bankrupt his trustee has no cause of action growing out of the settlement of the case, unless in the direction of pursuing the proceeds of a compromise actually received by the bankrupt.[76] And where property of the debtor is sold under execution in coercive adversary proceedings, in which he made an active though unsuccessful defense, it cannot be said that the sale is in any sense a fraud upon his creditors.[77]

§ 452. Sales of Merchandise in Bulk.—Where a merchant sells his entire stock in trade at one time to one purchaser, it is such an unusual occurrence and so far out of the ordinary course of business as to be presumptive evidence of fraud and to charge the purchaser with knowledge of the facts and with bad faith, so that the burden is on him to sustain the validity of his purchase by showing that he took all reasonable and proper steps to ascertain the seller's financial condition and that he bought in good faith and for a present fair consideration.[78] And if it is

son v. May, 16 N. B. R. 425, Fed. Cas. No. 7,397. But see In re Letson, 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

[71] Irish v. Citizens' Trust Co., 163 Fed. 880, 21 Am. Bankr. Rep. 39.

[72] Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306. See In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[73] Wiley v. McBride, 74 Ark. 34, 85 S. W. 84; In re Friedman, 153 Fed. 939.

[74] In re Bear, 11 N. B. R. 46, Fed. Cas. No. 1,178.

[75] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[76] Edington v. Masson, 177 Fed. 209, 101 C. C. A. 379, 24 Am. Bankr. Rep. 183.

[77] Nelson v. Svea Pub. Co., 178 Fed. 136.

[78] Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; In re Calvi, 185 Fed. 642, 26 Am. Bankr. Rep. 206; Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228; In re Knopf, 144 Fed. 245, 16 Am. Bankr. Rep. 432; In re Hemstreet, 139 Fed. 958, 14 Am. Bankr. Rep. 823; Norton v. Billings, 9 Biss. 528, 4 Fed. 623; Main v. Glen, 7 Biss. 86, Fed. Cas. No. 8,973; In re Dean, 2 N. B. R. 89, Fed. Cas. No. 3,700; Foster v. Hackley, 2 N. B. R. 406, Fed. Cas. No. 4,971; Parker v. Sherman, 201 Fed. 155; In re Lipman, 201 Fed. 169,

shown that the sale was made secretly, or with an evident desire to conceal it, that it was made at night, or made hurriedly and with little or no preliminary negotiation, that it was made after a superficial examination of the goods or without taking an inventory, and particularly if the price paid was considerably less than the value of the goods, these are indicia of fraud counting heavily against the purchaser in the trustee's suit to set aside the sale as fraudulent.[79] Such a transaction may also be held void under § 67e of the Bankruptcy Law, as a transfer "held null and void under the laws of the state," since the "bulk sales laws" now in force in numerous states forbid such a transfer except where certain conditions are complied with.[80] But if the state law is construed as available only in favor of those creditors whose claims arose from the sale of the stock of merchandise or some part of it, and only as giving such a creditor a lien, analogous to a vendor's lien, which may be enforced by appropriate legal proceedings in the event of a sale in violation of the provisions of the act, but not as enabling any creditor to treat the sale as a nullity and proceed with the collection of his entire debt, then a sale made in defiance of the statute is not such a one as may be impeached by the trustee in bankruptcy of the seller, for the general estate of the seller can derive no benefit from such impeachment.[81] Further, where personal property, part of the bankrupt merchant's stock in trade, was sold to the same defendant, but at three different times, shortly before bankruptcy, the goods not comprising the entire stock in trade, it was not a sale in bulk.[82] Substantially the same rules apply to the case of a mortgage covering an entire stock in trade or the whole assets of a partnership or corporation.[83]

§ 453. "Preference" and "Fraudulent Transfer" Distinguished.— There is a marked distinction, which should be constantly kept in view, between a payment or transfer of property constituting a "preference" and a "fraudulent conveyance." It is true that a given transaction by an insolvent debtor may constitute both a preference and a fraudulent

29 Am. Bankr. Rep. 139. Compare Shelton v. Price, 174 Fed. 891, 23 Am. Bankr. Rep. 431.

[79] Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228; In re Knopf, 146 Fed. 109, 17 Am. Bankr. Rep. 48; Johnston v. Forsyth Mercantile Co., 155 Fed. 268, 19 Am. Bankr. Rep. 48.

[80] In re Clayton (D. C.) 259 Fed. 911, 43 Am. Bankr. Rep. 687; Brown v. Kossove, 255 Fed. 806, 167 C. C. A. 134, 43 Am. Bankr. Rep. 408; In re Thompson (D. C.) 242 Fed. 602, 40 Am. Bankr. Rep. 82; Philoon v. Babbitt, 119 Me. 172, 109 Atl. 817; Niklaus v. Lessenhop, 99 Neb. 803, 157 N. W. 1019.

[81] Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. And see Gorham v. Buzzell (D. C.) 178 Fed. 596, 24 Am. Bankr. Rep. 440.

[82] Carpenter v. Karnow (D. C.) 193 Fed. 762, 28 Am. Bankr. Rep. 21. And see Sabin v. Horenstein, 260 Fed. 754, 171 C. C. A. 492, 44 Am. Bankr. Rep. 422.

[83] Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555, 10 Am. Bankr. Rep. 616; Zartman v. First Nat. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

transfer.[84] But a transfer of money or property by an insolvent is not necessarily fraudulent under § 67e of the Bankruptcy Act, merely because it results in giving a preference to the creditor as defined in § 60 of the Act.[85] But though a preferential transfer is not in itself, or in its inception, fraudulent, it may be so manipulated or carried into later steps in an attempt to defeat a recovery by the trustee in bankruptcy as to bring the parties within that part of the statute which relates to fraudulent conveyances.[86] Thus where a creditor, having secured from his insolvent debtor a transfer of property, the enforcement of which would effect a preference under the Bankruptcy Act, advanced money to the debtor, upon an assignment of certain book accounts, for the purpose of tiding the insolvent over the period of four months, so that the preference could not be vacated in the bankruptcy proceedings, it was held that the trustee could recover the value of the accounts.[87] These distinctions may be further illustrated by some quotations from judicial opinions. "A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect of enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view of obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference."[88] "In a preferential transfer, the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual,—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him."[89] "A preferential payment may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance. It can only become the latter in the unusual case where actual fraud in addition to the preference is established. Thus, a secret trust in favor of a person making such payments might turn

[84] Chapman v. Hunt (D. C.) 248 Fed. 160, 41 Am. Bankr. Rep. 482; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[85] Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473.

[86] Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473.

[87] Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973.

[88] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 22 Am. Bankr. Rep. 1.

[89] In re Maher, 144 Fed. 503, 16 Am. Bankr. Rep. 340. And see Meservey v. Roby, 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529; In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102.

a mere preference into a fraudulent conveyance."[90] The question whether a given transaction constitutes the one or the other is therefore a question of fact, depending, on the one hand, on the fraudulent purpose and intent of the debtor, or, on the other hand, on the creditor's knowledge or reasonable cause to believe that a preference was intended. But if, in a case of payments made to certain creditors to the exclusion of others, there is any substantial evidence of an intent to delay or defraud the unpaid creditors, it is properly submitted to the consideration of the jury.[91]

It follows that a payment of money or a transfer of property by an insolvent debtor, for the purpose of discharging or securing a bona fide existing debt, in good faith and without any intent to affect other creditors injuriously beyond what must necessarily result from the corresponding diminution of the debtor's assets, is not in itself a "fraudulent transfer," nor evidence of an intent to delay or defraud creditors, and is not voidable by the trustee in bankruptcy unless violative of those provisions of the statute which relate specifically to preferences.[92] In order to recover money paid or property transferred by way of preference, it is necessary for the trustee to show that "the person receiving it, or to be benefited thereby, or his agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference."[93] Lacking proof of such cause of belief, a transaction such as we have supposed above, is not voidable under those provisions of the law which relate to fraudulent conveyances.[94] It is not enough to show that the debtor intended to give a preference, or that he had a fraudulent design to exclude his other creditors or make them suffer.[95] But conversely, if the debtor intended to give a preference, and the creditor knew it or had reasonable cause to believe it, the transfer is voidable in the character of a preference, without regard to an actual fraudulent intent on either part.[96] Thus, a mortgage given by an insolvent debtor, subsequently and within four months, adjudged a bankrupt, to secure money

[90] Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345. And see Githens v. Shiffler, 112 Fed. 505, 7 Am. Bankr. Rep. 453; In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102; Ex parte Stubbins, L. R. 17 Ch. Div. 58; Kingsbury v. First Nat. Bank, 71 Kan. 570, 81 Pac. 187; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412. Compare In re Hill, 140 Fed. 984, 15 Am. Bankr. Rep. 499; Allen v. French, 178 Mass. 539, 60 N. E. 125.

[91] Webb's Trustee v. Lynchburg Shoe Co., 106 Va. 726, 56 S. E. 581.

[92] Coder v. Arts, 152 Fed. 948, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; Manning v. Evans, 156 Fed. 106, 19 Am. Bankr. Rep. 217; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144; Maffi v. Stephens (Tex. Civ. App.) 93 S. W. 158.

[93] Bankruptcy Act 1898, § 60b.

[94] Townes v. Alexander, 69 S. C. 23, 48 S. E. 214; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115.

[95] Blakey v. Boonville Nat. Bank, 95 Fed. 267, 2 Am. Bankr. Rep. 459.

[96] Ferguson v. Lederer, Strauss & Co., 128 Iowa, 286, 103 N. W. 794.

borrowed at the time for the purpose of preferring certain of his creditors, is voidable, provided the lender knew or had reason to believe that such was his purpose.[97] But it must be admitted that, although the theoretical distinction is clear, the complex circumstances of many cases often make it difficult to draw the line sharply. Thus, in one case a corporation executed mortgages covering all its property, to certain favored creditors, who were not pressing it for payment nor asking to be secured, intending thereby to force indulgence from its other creditors and further advances from those secured. It was held that the mortgages were intended to "hinder, delay, and defraud" creditors, and were on that ground voidable in bankruptcy.[98]

§ 454. Transfers Void Under State Laws.—By the express provisions of the bankruptcy law all transfers, conveyances, or incumbrances of property made by an insolvent debtor, within four months before his bankruptcy, are voidable at the suit of the trustee in bankruptcy, if held null and void as against creditors by the law of the state, whether or not they would be voidable at common law, and whether or not within the specific denouncements of the bankruptcy act.[99] Thus where the action is to set aside a conveyance alleged to be fraudulent and void under the state law, actual fraud or an actual fraudulent intent is not necessary to be made out unless the state law requires it. If that law avoids, as to creditors, transactions only presumptively fraudulent, or attended by "legal" as distinguished from "actual" fraud, the same will be void at the suit of the trustee in bankruptcy.[100] And in determining the validity of any transfer or incumbrance alleged to be voidable under the law of the state, and assailed distinctly on that ground, the courts of bankruptcy will follow and be governed by the applicable decisions of the courts of the state.[101] In the case of a conflict of laws,

[97] In re Pease, 129 Fed. 446, 12 Am. Bankr. Rep. 66.

[98] In re Steininger Mercantile Co., 107 Fed. 669, 46 C. C. A. 548, 6 Am. Bankr. Rep. 68.

[99] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; In re Bement, 172 Fed. 98, 96 C. C. A. 412, 22 Am. Bankr. Rep. 616; Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re Broome, 3 Ben. 488, 3 N. B. R. 343, Fed. Cas. No. 1,966; In re J. S. Appel Suit & Cloak Co., 198 Fed. 322, 28 Am. Bankr. Rep. 818; Pew v. Price, 158 S. W. 338, 251 Mo. 614; Goodwin v. Tuttle, 70 Or. 424, 141 Pac. 1120.

[100] In re Gelver, 193 Fed. 128, 28 Am. Bankr. Rep. 413.

[101] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Chicago Bank v. Kansas Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, 14 Am. Bankr. Rep. 74; Swager v. Smith (C. C. A.) 194 Fed. 762, 27 Am. Bankr. Rep. 660; Howard v. Prince, 1 Hughes, 239, 11 N. B. R. 322, Fed. Cas. No. 6,762; Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543; In re Thorson Bros. (D. C.) 209 Fed. 961;

where the transfer sought to be set aside was a transfer of real property, the law of that state will govern in which the property is situated.[102] In the case of a contract, the decision will be made in accordance with the law of the place of its performance, rather than that of the place where the contract was made.[103] In a case where personal property of the bankrupt, mortgaged in Illinois, was, with the consent of the mortgagees, removed to Tennessee, and thence to Mississippi, and finally to Arkansas, where the mortgagor was adjudged bankrupt, it was held that the rights of the mortgagees and the general creditors must be determined by the laws of Arkansas.[104]

In the case of a chattel mortgage, aside from any question of actual fraud or of an intention to contravene or defeat the bankruptcy law, the validity of such an instrument is to be tested by the law of the state; and if that law prescribes certain conditions as essential to its validity when attacked by other creditors,—such as registration or filing for record, change of possession, accountability for sales out of stock, or the like,—the trustee in bankruptcy may assail and avoid it for lack of compliance with those conditions.[105] So he may take advantage of

Stewart v. Asbury, 199 Mo. App. 123, 201 S. W. 949; Woodman v. Butterfield, 116 Me. 241, 101 Atl. 25; Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665; Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044.

[102] Hall v. Glenn (D. C.) 247 Fed. 997, 39 Am. Bankr. Rep. 54.

[103] Gielow v. Eastern Shore Shipbuilding Corp. (D. C.) 265 Fed. 845.

[104] In re Davies (D. C.) 256 Fed. 52, 43 Am. Bankr. Rep. 458.

[105] Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, 27 Am. Bankr. Rep. 856; Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90; Scandinavian-American Bank v. Sabin, 227 Fed. 579, 142 C. C. A. 211, 36 Am. Bankr. Rep. 151; Massachusetts Bonding & Ins. Co. v. Kemper, 220 Fed. 847, 136 C. C. A. 593, 34 Am. Bankr. Rep. 80; Millikin v. Second Nat. Bank, 206 Fed. 14, 124 C. C. A. 148, 30 Am. Bankr. Rep. 477; Smith v. Carukin, 259 Fed. 51, 170 C. C. A. 51, 44 Am. Bankr. Rep. 278; Calkins v. Lichtig, 251 Fed. 844, 164 C. C. A. 60, 42 Am. Bankr. Rep. 306; In re Palmer (D. C.) 218 Fed. 74, 33 Am. Bankr. Rep. 689; In re Cooper's Estate (D. C.) 226 Fed. 317, 35 Am. Bankr. Rep. 321; In re Roberts (D. C.) 227 Fed. 177, 36 Am. Bankr. Rep. 137; In re Schilling (D. C.) 251 Fed. 972, 41 Am. Bankr. Rep. 698; Rader v. Star Mill & Elevator Co., 258 Fed. 599, 169 C. C. A. 541, 43 Am. Bankr. Rep. 754; In re Steiner (D. C.) 249 Fed. 880; In re Perpall (C. C. A.) 261 Fed. 858, 44 Am. Bankr. Rep. 519; In re Roseboom (D. C.) 253 Fed. 136, 42 Am. Bankr. Rep. 437; Stewart v. Asbury, 199 Mo. App. 123, 201 S. W. 949; Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22; Davis v. Harlow, 130 Md. 165, 100 Atl. 102; In re Noethen, 195 Fed. 573, 27 Am. Bankr. Rep. 910; In re Jules & Frederic Co., 193 Fed. 533, 27 Am. Bankr. Rep. 136; Alter v. Clark, 193 Fed. 153; In re Geiver, 193 Fed. 128, 28 Am. Bankr. Rep. 413; In re Jackson Brick & Tile Co., 189 Fed. 636, 26 Am. Bankr. Rep. 915; Mishawaka Woolen Mfg. Co. v. Teasdale, 145 Wis. 73, 129 N. W. 671; Low v. Taylor, 73 N. J. Eq. 406, 68 Atl. 128; In re Walden Bros. Clothing Co., 199 Fed. 315, 29 Am. Bankr. Rep. 80; L. A. Becker Co. v. Gill (C. C. A.) 206 Fed. 36, 30 Am. Bankr. Rep. 429; In re United States Lumber Co., 206 Fed. 236, 30 Am. Bankr. Rep. 682. And see supra, § 367. Compare Johnstone v. Babb, 240 Fed. 668, 153 C. C. A. 466, 38 Am. Bankr. Rep. 715; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284; Davis v. Hanover Savings Fund Society, 210 Fed. 768, 127 C. C. A. 318, 31 Am. Bankr. Rep. 368.

A mortgage covering both real and per-

a state law which avoids, as to creditors, a mortgage made by any corporation while insolvent or when its insolvency is imminent,[106] or made without such authorization or consent on the part of the stockholders as is required by the state law,[107] or, following the course of judicial decisions in the state, he may assail the validity of a chattel mortgage where the principal part of the property covered consists of articles perishable in their nature or which would ordinarily be consumed in the use before a sale on foreclosure could be made.[108] But where the failure to file or record a chattel mortgage in accordance with the laws of the state is cured by the act of the mortgagee in taking actual possession of the mortgaged property before the bankruptcy proceedings, the lien of the mortgage will be good as against the trustee in bankruptcy, unless he can find some other ground to attack it than the mere want of record;[109] and if the mortgage was valid between the parties and given in good faith more than four months prior to the bankruptcy proceedings, the act of the mortgagee in taking possession within that period is not a voidable transfer.[110]

The rule is substantially the same as to contracts of conditional sale. The claim of the vendor will not prevail against the trustee in bankruptcy of the purchaser if the contract was not acknowledged, filed, recorded, etc., as required by the laws of the state.[111] And a contract for

sonal property and duly recorded as a real-estate mortgage, is nevertheless void as against the mortgagor's trustee in bankruptcy unless also recorded as a chattel mortgage. Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, 30 Am. Bankr. Rep. 655.

[106] McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co., 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393.

[107] In re Progressive Wall Paper Corp. (D. C.) 230 Fed. 171, 37 Am. Bankr. Rep. 207.

[108] Swager v. Smith, 194 Fed. 762, 114 C. C. A. 482, 27 Am. Bankr. Rep. 660.

[109] Coggan v. Ward, 215 Mass. 13, 102 N. E. 336; First Nat. Bank v. Wegener, 94 Or. 318, 181 Pac. 990, 186 Pac. 41; Jones v. Bank of Excelsior Springs, 201 Mo. App. 545, 213 S. W. 892. Compare Schaupp v. Miller (D. C.) 206 Fed. 575, 30 Am. Bankr. Rep. 699.

[110] Kettenbach v. Walker, 32 Idaho, 544, 186 Pac. 912.

[111] L. A. Becker Co. v. Gill, 206 Fed. 36, 124 C. C. A. 170, 30 Am. Bankr. Rep. 429; Gielow v. Eastern Shore Shipbuilding Corp. (D. C.) 265 Fed. 845; In re Bennett (D. C.) 264 Fed. 533, 45 Am. Bankr. Rep. 565; In re A. E. Savage Baking Co. (D. C.) 259 Fed. 976, 43 Am. Bankr. Rep. 721; In re Mutual Motors Co. (D. C.) 260 Fed. 341, 44 Am. Bankr. Rep. 337; In re Capital City Cap Co. (D. C.) 251 Fed. 664, 41 Am. Bankr. Rep. 604; In re Kruse (D. C.) 234 Fed. 470, 37 Am. Bankr. Rep. 687; Columbus Merchandise Co. v. Kline (D. C.) 248 Fed. 296; In re M. L. B. Sturkey Co. (D. C.) 224 Fed. 251, 35 Am. Bankr. Rep. 371; In re Pacific Electric & Automobile Co. (D. C.) 224 Fed. 220, 35 Am. Bankr. Rep. 222; In re Vandewater & Co. (D. C.) 219 Fed. 627, 33 Am. Bankr. Rep. 671; In re Johnson (D. C.) 215 Fed. 666, 33 Am. Bankr. Rep. 104; In re O'Brien (D. C.) 215 Fed. 129, 32 Am. Bankr. Rep. 347; In re Johnson (D. C.) 212 Fed. 311, 31 Am. Bankr. Rep. 579; In re United States Lumber Co. (D. C.) 206 Fed. 236, 30 Am. Bankr. Rep. 682. Compare Baker Ice Machine Co. v. Bailey, 209 Fed. 603, 126 C. C. A. 425, 31 Am. Bankr. Rep. 593; Delaval Separator Co. v. Jones, 117 Me. 95, 102 Atl. 968.

the absolute sale of goods to the bankrupt, but with a reservation of a lien for the purchase price, must be recorded, if that is required by the law of the state, in order to be valid against the trustee in bankruptcy.[112] So, where a contract for the sale of fertilizers on credit to the bankrupt provided that the proceeds of sales made by him should be held for the seller to be applied on the price, it was held that such debts constituted personal property and required the contract to be recorded, under the local law, in default of which the seller was not entitled to a lien as against the trustee in bankruptcy.[113] But a mining lease reserving a lien for royalties is not a conveyance to secure a debt, such as must be recorded in Alabama, but is valid and enforceable, on the bankruptcy of the lessee, for past-due royalties.[114] So, also, the trustee in bankruptcy, as the representative of creditors, may resist adverse claims to property or liens thereon on the ground of failure of compliance with a state statute providing that every sale of goods in the possession of the vendor, not accompanied by immediate delivery and change of possession, shall be presumed fraudulent as to creditors,[115] or one regulating sales in bulk,[116] or a state law or course of judicial decisions invalidating an assignment of a chose in action unless there is delivery of the property or the evidence of it and notice given to the person against whom it is available.[117] In South Carolina, an assignment of a bond for title, and the recording of such an instrument, without its being proved in the manner required by law, by one who subsequently became bankrupt, is a nullity.[118] And under the law of Mississippi, requiring transfers between husband and wife to be in writing and recorded, in order to be good as against third persons, the trustee in bankruptcy of a married woman may recover a stock of goods verbally transferred.[119] So also, a trustee in bankruptcy may defeat an adverse

[112] Walter A. Wood Mowing & Reaping Machine Co. v. Croll, 231 Fed. 679, 145 C. C. A. 565, 36 Am. Bankr. Rep. 610; In re Stoughton Wagon Co., 231 Fed. 676, 145 C. C. A. 562, 36 Am. Bankr. Rep. 592; In re American Steel Supply Syndicate (D. C.) 256 Fed. 876, 43 Am. Bankr. Rep. 271.

[113] Townsend v. Ashepoo Fertilizer Co., 212 Fed. 97, 128 C. C. A. 613, 31 Am. Bankr. Rep. 682.

[114] In re Gallagher Coal Co. (D. C.) 205 Fed. 183, 29 Am. Bankr. Rep. 766.

[115] Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413; In re Waite-Robbins Motor Co. (D. C.) 192 Fed. 47, 27 Am. Bankr. Rep. 541; In re Colonial Mill & Lumber Co. (D. C.) 215 Fed. 640. See Williamson v. Richardson, 205 Fed. 245, 123 C. C. A. 427, 30 Am. Bankr. Rep. 559. As to the law of Pennsylvania applicable to such sales, see In re Komara, 251 Fed. 47, 163 C. C. A. 297, 42 Am. Bankr. Rep. 236.

[116] In re Schoenfield (D. C.) 190 Fed. 53, 27 Am. Bankr. Rep. 64. And see, supra, § 452.

[117] In re Hawley Down Draft Furnace Co. (D. C.) 230 Fed. 471, 36 Am. Bankr. Rep. 584. See In re Rosenthal (D. C.) 238 Fed. 597, 39 Am. Bankr. Rep. 30; Ward v. American Agricultural Chemical Co., 232 Fed. 119, 146 C. C. A. 311, 36 Am. Bankr. Rep. 321.

[118] In re Rosenthal (D. C.) 238 Fed. 597, 39 Am. Bankr. Rep. 30.

[119] McCabe v. Guido, 116 Miss. 858, 77 South. 801.

claim to property by relying upon a state statute prohibiting any corporation, while incurring debts and liabilities, from giving to a stockholder and director for the benefit of another stockholder or director any part of its capital.[120] And a transfer or mortgage of property, which is invalid under the law of the state because made to one having knowledge or reasonable cause to suspect that it was made with the intention of hindering or defrauding creditors, will be voidable by the trustee in bankruptcy.[121] But the case must be brought within the very terms of the statute. Thus, where it provides that certain transfers of property shall be declared void "at the suit of any creditor," it cannot be invoked in a case where bankruptcy proceedings were instituted before any such suit was commenced.[122] And though the rights of a trustee in bankruptcy and those of an assignee in insolvency under the state statute are defined in similar terms, yet it does not follow that a state statute making a certain transfer void as against an assignee eo nomine will also make it void as against a trustee in bankruptcy.[123] If the state statute requires the recording of conveyances, chattel mortgages, conditional sales, etc., in order to make them valid as against subsequent purchasers and incumbrancers in good faith without notice, but not as against general creditors, a transfer which is good between the parties though not recorded is not avoidable by the trustee in bankruptcy, since he does not come within either of those descriptions.[124] But if the statute makes an unrecorded transfer or contract voidable at the instance of "creditors," then it may be avoided by the trustee in bankruptcy, not only because he represents the creditors, but because, since the 1910 amendment to the Bankruptcy Act, he has the status of a creditor armed with a lien.[125]

120 Hazard v. Wight, 201 N. Y. 399, 94 N. E. 855.

121 In re Walden Bros. Clothing Co. (D. C.) 199 Fed. 315, 29 Am. Bankr. Rep. 80.

122 In re Chadwick (D. C.) 140 Fed. 674, 15 Am. Bankr. Rep. 528. And see Mayhew v. Todisman, 246 Mo. 288, 151 S. W. 436.

123 In re Loveland, 155 Fed. 838, 84 C. C. A. 72, 15 Am. Bankr. Rep. 18.

124 Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295, 36 Am. Bankr. Rep. 704; Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; In re I. S. Remson Mfg. Co., 232 Fed. 594, 146 C. C. A. 552, 36 Am. Bankr. Rep. 799; In re Virgin (D. C.) 224 Fed. 128, 35 Am. Bankr. Rep. 494; Robertson v. Schlotzhauer, 243 Fed. 324, 156 C. C. A. 104, 40 Am. Bankr. Rep. 237; In re Dagwell (D. C.) 263 Fed. 406, 45 Am. Bankr. Rep. 358; Johnson v. Barrett (D. C.) 237 Fed. 112, 38 Am. Bankr. Rep. 464; In re Bolstad (D. C.) 224 Fed. 283, 35 Am. Bankr. Rep. 355; Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118, 30 Am. Bankr. Rep. 79; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284.

125 National Bank of Bakersfield v. Moore, 247 Fed. 913, 160 C. C. A. 103, 41 Am. Bankr. Rep. 409; Hawkins v. Dannenberg Co. (D. C.) 234 Fed. 752, 37 Am. Bankr. Rep. 262; In re Marriner (D. C.) 220 Fed. 542, 34 Am. Bankr. Rep. 444; In re Pittsburgh-Big Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81. See In re Wall (D. C.) 207 Fed. 994, 29 Am. Bankr. Rep. 901; In re White's Express Co., 215 Fed. 894, 132 C. C. A. 234, 33 Am. Bankr. Rep. 74.

If it is voidable only at the instance of a creditor who has taken some positive step, such as attaching the property or otherwise fixing a lien upon it, then it may be avoided by the trustee only in case a superior position has been gained by some creditor whom he represents or whose place he is entitled to take, before the recording.[126] Thus, if the law of the state is such that a chattel mortgage is voidable only in favor of a creditor who fixes a lien on the property before the instrument is recorded, and if it is in fact recorded before the bankruptcy proceedings and before any creditor has acquired superior rights, though within the four months' period, it is valid as against the trustee, because the latter acquires his lien or status as a lien creditor only upon and by the bankruptcy proceedings.[127] It is true, however, that a mortgage given by a bankrupt, though for a valid consideration and valid as between the parties, if withheld from record in pursuance of an agreement between them, so as not to impair the mortgagor's credit, may be set aside at the suit of his trustee as a fraudulent transaction.[128] But the mere failure to record the instrument is not sufficient evidence of an agreement between the bankrupt and the mortgagee to withhold it from record for improper purposes.[129] Finally, it should be remembered that although an instrument may escape the charge of being a fraudulent transfer, the circumstances may still be such as to render it voidable as a preference.[130]

§ 455. Transfers Fraudulent as to Partnership or Individual Creditors.—The trustee of a bankrupt partnership can sue to set aside fraudulent transfers of its property or assets on the same grounds and under the same conditions as in the case of an individual bankruptcy.[131] But since the bankruptcy of a firm does not necessarily involve that of its members, the distinction must be carefully drawn between transfers or conveyances by the firm and such as are made by the partners individually. Thus, the validity of a mortgage given by the partnership as such is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone.[132] It is a fundamental rule of

[126] Bradley v. Robie (C. C. A.) 266 Fed. 884, 46 Am. Bankr. Rep. 93; In re Brown (D. C.) 228 Fed. 533, 35 Am. Bankr. Rep. 826; In re Bradley (D. C.) 263 Fed. 446, 45 Am. Bankr. Rep. 30; American Laundry Machinery Co. v. Everybody's Laundry, 185 Iowa, 760, 171 N. W. 161.

[127] Martin v. Commercial Nat. Bank, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. 441, 40 Am. Bankr. Rep. 765.

[128] National Bank of Athens v. Shackelford, 208 Fed. 677, 125 C. C. A. 575, 31 Am. Bankr. Rep. 464.

[129] In re Anderson (D. C.) 252 Fed. 272, 41 Am. Bankr. Rep. 731.

[130] Bunch v. Maloney, 233 Fed. 967, 147 C. C. A. 641, 37 Am. Bankr. Rep. 369.

[131] Barker v. Franklin, 37 Misc. Rep. 292, 75 N. Y. Supp. 305; Shainwald v. Lewis (D. C.) 6 Sawy. 556, 6 Fed. 753; Hull v. Hudson, 9 Del. Ch. 205, 80 Atl. 674.

[132] McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638.

equity as well as of bankruptcy that partnership assets are for partnership creditors and individual assets for individual creditors,[133] and any attempt to appropriate assets of the one class to the satisfaction of creditors of the other class is fraudulent in law. Hence where an insolvent partnership, within four months prior to its bankruptcy, incumbers its property to secure the individual debt of one partner, or pays such debt with firm assets, the transfer is voidable by the trustee,[134] unless in the case where all who were creditors of the firm at the time consented to the transaction or were paid off before the bankruptcy.[135] Again, the dissolution of a partnership while insolvent, and the division of the firm property among the partners, to be held as their individual property, thus giving individual creditors a more advantageous position than firm creditors, the latter being justly and equitably entitled to priority of payment from such property, is contrary to the whole theory of the bankruptcy law; and where such dissolution takes place within four months before the firm is adjudged bankrupt, it will be treated as a void transfer, and the property in the hands of both partners will be treated as firm property, without regard to any actual fraudulent intention on their part.[136] More especially, a pretended dissolution of a partnership, with a fraudulent intention to place the continuing partner in such a position that he could claim individual exemptions in bankruptcy out of the firm's assets is ineffectual as against partnership creditors.[137] Different problems arise where one of the partners of an insolvent firm sells and transfers his entire interest in the firm and its business to his co-partner, the latter agreeing to assume the firm debts. Such a transfer is not necessarily fraudulent and voidable under the bankruptcy law,[138] but it is so if made in contemplation of the bankruptcy of the continuing partner and with no bona fide expectation of continuing the business,[139] or if the sale was fictitious, the money paid being covertly returned to the buyer and afterwards used in the firm's business.[140] And a chattel mortgage taken by the retiring partner and covering all the goods in stock and to be acquired, and which is by agreement kept from the record, is fraudulent and void as to subsequent creditors.[141] So also,

[133] Supra, § 123.

[134] In re W. J. Floyd & Co., 156 Fed. 206, 19 Am. Bankr. Rep. 438. But see Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641, 33 Am. Bankr. Rep. 677.

[135] Merchants' Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65.

[136] In re Head, 114 Fed. 489, 7 Am. Bankr. Rep. 556; In re Terens, 175 Fed. 495, 23 Am. Bankr. Rep. 680. See Hodgskin v. Heim, 33 Misc. Rep. 548, 67 N. Y. Supp. 876.

[137] In re Abrams, 193 Fed. 271, 34 Am. Bankr. Rep. 552.

[138] In re Rudnick, 102 Fed. 750, 4 Am. Bankr. Rep. 531.

[139] In re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2,270.

[140] Burrill v. Lawry, 2 Hask. 228, 18 N. B. R. 367, Fed. Cas. No. 2,199.

[141] In re Stephens, 3 Biss. 187, 6 N. B. R. 533, Fed. Cas. No. 13,365.

where a firm which became bankrupt paid a substantial sum of money to one of the partners in return for his investment in the business, after he saw that it was not going to be profitable, and when the partners knew that the financial condition of the firm was precarious, it was held that this constituted a withdrawal of the partner's interest before the firm's debts were paid, and he was therefore bound to repay the amount to the firm's trustee in bankruptcy.[142]

§ 456. **Property or Rights Transferred.**—Under the provisions of the Bankruptcy Act relating to fraudulent transfers of "property," that term is taken in a very wide sense. It may include money, if a payment is made with a purpose to benefit one creditor at the expense of others or to defeat the operation of the bankruptcy law.[143] It may include a growing crop on land owned or rented by the debtor,[144] or a piece of jewelry given to a friend.[145] It may include the furniture and other belongings of the debtor's own house, when given to his wife without consideration and while he is insolvent.[146] It may also include a lease or leasehold interest, if it has value,[147] or a claim for money or other chose in action,[148] or the salary of a city official, when assigned by him in fraud of his creditors,[149] or a policy of life insurance having a cash surrender value,[150] or a paid-up endowment life policy taken out by the bankrupt, the insured, and transferred to his wife.[151] But since creditors can be defrauded only by the transfer of something to which they might have had recourse for the satisfaction of their claims, the statute does not apply to a transfer of real property in which the bankrupt had no beneficial interest though he held the legal title, such title being held merely in trust for his wife.[152] And the trustee in bankruptcy cannot maintain an action to recover property which never stood in the bankrupt's name, although he paid the price of it, when it was transferred directly from the seller to a third person, notwithstanding this course was taken in pursuance of a purpose, on the part of the bankrupt and the person taking the title, to hinder and defraud creditors, since the property cannot be said to have

[142] In re Rosenthal (D. C.) 200 Fed. 190, 29 Am. Bankr. Rep. 515.

[143] Smith v. Powers (D. C.) 255 Fed. 582, 43 Am. Bankr. Rep. 303; Wartell v. Moore (C. C. A.) 261 Fed. 762, 44 Am. Bankr. Rep. 624.

[144] Crawford v. Broussard, 260 Fed. 122, 171 C. C. A. 158, 43 Am. Bankr. Rep. 603, 44 Am. Bankr. Rep. 187.

[145] Pollock v. Simon (D. C.) 205 Fed. 1005, 30 Am. Bankr. Rep. 390.

[146] In re Pierce, 7 Biss. 426, 15 N. B. R. 449, Fed. Cas. No. 11,139.

[147] Jones v. Slauson, 33 Fed. 632; Lyon v. Moore, 259 Ill. 23, 102 N. E. 179.

[148] O'Sullivan's Trustee v. Douglass, 98 S. W. 990, 30 Ky. Law Rep. 366. See Williamson v. Colcord, 1 Hask. 620, 13 N. B. R. 319, Fed. Cas. No. 17,752.

[149] O'Sullivan's Trustee v. Douglass, 98 S. W. 990, 30 Ky. Law Rep. 366.

[150] Kirkpatrick v. Johnson, 197 Fed. 235, 28 Am. Bankr. Rep. 291.

[151] Bailey v. Wood, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722.

[152] Phillips v. Kleinman, 232 Pa. St. 571, 81 Atl. 648.

been transferred by the bankrupt.[153] So also with respect to exempt property. Since this could not in any event be reached by creditors, they are not defrauded by its transfer. And any mortgage or conveyance of a homestead or other exempt property which would be good against the debtor under the state law will also be good against his trustee in bankruptcy.[154] And in some of the federal courts (following the local law and decisions) it is held that the use of money or of the proceeds of non-exempt property by an insolvent debtor to purchase a homestead, or to discharge a lien thereon, is not fraudulent and does not invalidate his claim to the homestead exemption, or give his trustee in bankruptcy the right to subject the homestead to a lien for the amount so diverted from his creditors.[155]

§ 457. Time of Conveyance or Transfer.—The sixty-seventh section of the bankruptcy act gives to a trustee in bankruptcy the right to avoid any conveyance, transfer, assignment, or incumbrance of the bankrupt's property which would be fraudulent and voidable as to his creditors under the principles of the common law, or which would be held null and void as to such creditors under the laws of the state where the property is situated, but expressly limits this right to transactions occurring within four months prior to the filing of the petition in bankruptcy. Therefore if no petition in bankruptcy is filed by or against the debtor until more than four months have elapsed after a sale or other transfer of property by him, or the giving of a mortgage thereon, or a gift or a preferential payment or an assignment for creditors, the transaction will remain valid so far as the bankruptcy law is concerned, and cannot be impeached by a trustee in bankruptcy subsequently appointed.[156] But the transfer must have been made, or the lien given, more than four months before the bankruptcy. If made or given within that period, it will not be saved by the fact that it merely carried into effect an agreement entered into

[153] London v. Epstein, 138 App. Div. 513, 123 N. Y. Supp. 399.

[154] In re National Grocer Co., 181 Fed. 33, 24 Am. Bankr. Rep. 360; Cowan v. Burchfield, 180 Fed. 614, 25 Am. Bankr. Rep. 293; Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412. See Bohannon v. Clark, 78 S. W. 479, 25 Ky. Law Rep. 1710.

[155] In re Wilson, 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Contra, In re Boston, 98 Fed. 587, 3 Am. Bankr. Rep. 388.

[156] Sturdivant Bank v. Schade (C. C. A.) 195 Fed. 188, 27 Am. Bankr. Rep. 673; In re Shinn, 185 Fed. 990, 25 Am. Bankr. Rep. 833; Little v. Holley-Brooks Hardware Co., 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422; In re Kindt, 101 Fed. 107, 4 Am. Bankr. Rep. 148; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486; McIntire v. Jennings, 38 Wash. 119, 80 Pac. 278; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Watson v. Taylor, 21 Wall. 378, 22 L. Ed. 576; In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668; Johnson v. Wilson (D. C.) 217 Fed. 99, 33 Am. Bankr. Rep. 518; First Nat. Bank v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092. See In re Taylor, 95 Fed. 956; Merrill v. Hussey, 101 Me. 439, 64 Atl. 819.

at an earlier date.[157] Again, it is the date when the transfer or incumbrance is executed, not the date when it is recorded, which fixes the question of its validity in bankruptcy.[158] This may seem inequitable as to creditors, who may have no means of discovering an unrecorded mortgage or the like. But it is a necessary deduction from the language of the statute, which takes the time of recording an instrument as the starting point for the period of limitations in two particular cases, namely, with reference to the time when a petition must be filed after the commission of an act of bankruptcy and with reference to the recovery of preferences, but makes no mention whatever of such an exception to the period of limitation prescribed by the section relating to fraudulent conveyances. Under former bankruptcy laws, it was held that the trustee might recover property conveyed away by the bankrupt with intent to defraud his creditors, though the conveyance was made before the passage of the bankruptcy act.[159] But in view of the fact that the present statute speaks of conveyances, etc., made "subsequent to the passage of this act," the contrary rule must now be applied.[160] Although the statute makes no specific provision covering the case of a sale or transfer of property by the bankrupt after the filing of the petition against him, yet such an attempt to control the disposition of his assets is of course a fraud upon the law itself, and is clearly voidable by the trustee in bankruptcy, at least when made to a party chargeable with knowledge of the facts.[161]

But another part of the bankruptcy act provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred,

[157] Vitzthum v. Large, 162 Fed. 685, 20 Am. Bankr. Rep. 666. But compare Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, 22 Am. Bankr. Rep. 803. And see Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A.) 175 Fed. 335, 23 Am. Bankr. Rep. 595, holding that property delivered by a bankrupt in good faith within four months prior to the bankruptcy on a previous contract of sale does not vest in the trustee, even though the transfer may be voidable as a preference.

[158] Bonner v. First Nat. Bank, 248 Fed. 692, 160 C. C. A. 592, 41 Am. Bankr. Rep. 60; Davis v. Hanover Savings Fund Society, 210 Fed. 768, 127 C. C. A. 318, 31 Am. Bankr. Rep. 368; Getman v. Lippert, 171 App. Div. 536, 157 N. Y. Supp. 867; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Dean v. Plane, 96 Ill. App. 428, affirmed, 195 Ill. 495, 63 N. E. 274. Contra, Cartwright v. West, 185 Ala. 41, 64 South. 293; Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; In re Tysor-Cheatham Mercantile Co. (D. C.) 178 Fed. 733, 24 Am. Bankr. Rep. 434; Arnold v. Eastin's Trustee, 116 Ky. 686, 76 S. W. 855, 25 Ky. Law Rep. 895.

[159] Bradshaw v. Klein, 2 Biss. 20, 1 N. B. R. 542, Fed. Cas. No. 1,790; Carr v. Hilton, 1 Curt. 230, Fed. Cas. No. 2,436; In re Hollenshade, 2 Bond, 210, 2 N. B. R. 651, Fed. Cas. No. 6,610; In re Rosenfield, 1 N. B. R. 575, Fed. Cas. No. 12,058; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[160] In re Brown, 91 Fed. 358; Gardner v. Haines, 19 S. D. 514, 104 N. W. 244. Compare Shelley v. Nolen, 39 Tex. Civ. App. 307, 88 S. W. 524.

[161] In re Denson, 195 Fed. 854, 28 Am. Bankr. Rep. 158.

unless he was a bona fide holder for value prior to the date of the adjudication." [162] It is very difficult to reconcile this broad and sweeping declaration with the more precise details concerning fraudulent conveyances given in the sixty-seventh section of the act. As stated in an earlier part of this chapter,[163] a reasonable construction of the act as a whole would lead to the conclusion that this declaration was not meant to add anything to the description of conveyances and incumbrances which should be voidable in bankruptcy, but should be taken merely as an explicit affirmation of the trustee's right of action in such cases. But it omits any mention of a limitation of time within which the transfer of property must have been made, and the courts have unanimously decided that, if a trustee in bankruptcy bases his suit distinctly on this provision of the statute,—that is, on his statutory right to avoid any transfer of property which any creditor of the bankrupt might have avoided,—then it is immaterial whether the transfer or conveyance which he attacks was made more or less than four months before the filing of the petition in bankruptcy.[164] But the opinion has been advanced that, in this case, a recovery by the trustee will inure to the benefit of only those creditors whose claims antedated the conveyance or transfer set aside.[165]

§ 458. **Insolvency of Debtor.**—As before stated, subdivision "e" of the sixty-seventh section of the bankruptcy act is divisible into two parts, the former relating to conveyances or incumbrances of property fraudulent as against creditors under the principles of the common law, and the latter to transfers of property held null and void as against creditors by the law of the state. The latter provision requires that the transfer shall have been made by the bankrupt "while insolvent;" the former contains no such restriction. Yet an intent to "hinder, delay, or defraud" creditors in the act of conveying or incumbering property is seldom if ever compatible with a condition of solvency. Hence the re-

[162] Bankruptcy Act 1898, § 70e.

[163] Supra, § 445.

[164] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; Cooper Grocery Co. v. Penland. 247 Fed. 480, 159 C. C. A. 534, 40 Am. Bankr. Rep. 589; Scales v. Holje, 41 Cal. App. 733, 183 Pac. 308; Riggs v. Price, 277 Mo. 333, 210 S. W. 420; Thomas v. Fletcher, 153 Fed. 226, 18 Am. Bankr. Rep. 623; In re Toothaker Bros., 128 Fed. 187, 12 Am. Bankr. Rep. 99; In re Schenck, 116 Fed. 554, 8 Am. Bankr. Rep. 727; Cartwright v. West, 155 Ala. 619, 47 South. 93; Commercial State Bank & Trust Co. v. Bates, 96 Miss. 386, 51 South. 599; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Treseder v. Burgor, 130 Wis. 201 109 N. W. 957; Friedman v. Verschofsky, 105 Ill. App. 414; Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Cookingham v. Ferguson, 8 Blatchf. 488, 4 N. B. R. 635, Fed. Cas. No. 3,182; Cady v. Whaling, 7 Biss. 430, Fed. Cas. No. 2,285; In re Herpich, 7 Biss. 387, 15 N. B. R. 426, Fed. Cas. No. 6,418; Knowlton v. Moseley, 105 Mass. 136. Compare Smith v. Seibel (D. C.) 258 Fed. 454; 44 Am. Bankr. Rep. 499.

[165] American Trust & Savings Bank v. Duncan, 254 Fed. 780, 166 C. C. A. 226, 43 Am. Bankr. Rep. 7.

quirement of insolvency, expressly stated in the latter part of the subdivision, may fairly be read into the former part by implication. And it follows as a general rule that a conveyance or incumbrance of property made at a time when the debtor was solvent is not voidable at the suit of his trustee, although bankruptcy follows within four months.[166] And if the trustee, in such an action, does not allege insolvency at the date of the transfer or offer evidence tending to show that fact, the court will presume that the bankrupt was solvent at that time.[167] But the opinion has sometimes been advanced that a transfer of property is voidable by the trustee if the remaining assets of the debtor would be insufficient to pay his debts, or in other words that, although he may have been solvent before making the particular transfer of property which is in question, yet if that transfer left him insolvent, the statute is satisfied.[168] And this doctrine derives some support from the declaration of the bankruptcy act that a person shall be deemed insolvent when his property, exclusive of that conveyed in fraud of creditors, is insufficient in amount, at a fair valuation, to pay his debts.[169] But it is thought that this general definition cannot prevail over the explicit provision of the statute that a fraudulent conveyance shall be void if made by the bankrupt "while insolvent." This obviously means that he must be insolvent before and at the moment of making the transfer. If he is solvent then, it can scarcely be said that the transfer was made "while" insolvent, merely because its effect is to leave him with insufficient assets. And this latter view is supported by cases of respectable authority.[170] But when the point at which insolvency becomes material has been determined, the condition itself is to be ascertained by applying the statutory definition, taking into account all the primary and contingent indebtedness of the bankrupt and all his property, the latter at a fair valuation.[171]

But under section 70e of the Bankruptcy Act, the trustee may avoid

[166] Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207; Butcher v. Cantor, 185 Fed. 945, 26 Am. Bankr. Rep. 424; Metropolitan Nat. Bank v. Rogers, 53 Fed. 776, 3 C. C. A. 666; Richardson v. Winnissimmet Nat. Bank, 189 Mass. 25, 75 N. E. 97; Mercer's Trustee v. Mercer, 74 S. W. 285, 24 Ky. Law Rep. 2469; Dutton v. Cloar, 26 Tex. Civ. App. 547, 65 S. W. 70; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; In re Cornwall, 9 Blatchf. 114, 6 N. B. R. 305, Fed. Cas. No. 3,250; Sedgwick v. Wormser, 7 N. B. R. 186, Fed. Cas. No. 12,626; Sedgwick v. Lynch, 5 Ben. 489, 8 N. B. R. 289, Fed. Cas. No. 12,615; In re Sola e Hijo (C. C. A.) 261 Fed. 822, 44 Am. Bankr. Rep. 372; In re Stringer, 253 Fed. 352, 165 C. C. A. 134, 41 Am. Bankr. Rep. 510.

[167] Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

[168] National Bank & Loan Co. v. Spencer, 53 App. Div. 547, 65 N. Y. Supp. 1001; Hamlin v. Arbolino, 72 Misc. Rep. 190, 131 N. Y. Supp. 45. See Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52.

[169] Bankruptcy Act 1898, § 1, clause 15.

[170] Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Owens v. Daniel, 230 Fed. 101, 144 C. C. A. 399, 36 Am. Bankr. Rep. 433.

[171] Rutland County Nat. Bank v. Graves, 156 Fed. 168, 19 Am. Bankr. Rep.

any transfer by the bankrupt which any creditor of the latter might have avoided under the laws of the state, without regard to the bankrupt's condition of solvency or insolvency at the date of the transfer.[172]

§ 459. **Intention of Debtor.**—In the case of conveyances held null and void as to creditors under the laws of the particular state, it is probably not necessary to show an actual fraudulent purpose on the part of the debtor, in order to avoid them in bankruptcy, since these laws usually apply to cases of constructive, technical, or presumed fraud.[173] But where an action to avoid a conveyance or incumbrance is based on the provision of the bankruptcy law which makes such transfers or liens voidable when made within four months prior to bankruptcy and "with the intent and purpose to hinder, delay, or defraud his creditors, or any of them," an actual fraudulent purpose on the part of the debtor is an essential element of the trustee's right of action, and unless it is affirmatively established the transaction must stand good.[174] It is not enough to show that the necessary consequence of the transfer or incumbrance is to hinder creditors in enforcing their claims, or that it defrauds them in the sense of leaving the debtor insolvent or even penniless, or that the property so disposed of was more in value than the debtor could rightfully withdraw from the reach of his creditors.[175] The statute cannot be read as denouncing any transfer which produces a given result, irrespective of the motive. On the contrary it is aimed only at such conveyances as would be fraudulent and voidable at common law or under the statute of Elizabeth, and under the bankruptcy act, as in those cases, an actual fraudulent intent on the part of the debtor is essential.[176] Thus, a sale, payment, or mortgage made in

446; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Gill v. Ely-Norris Safe Co., 170 Mo. App. 478, 156 S. W. 811.

[172] Baldwin v. Kingston (D. C.) 247 Fed. 163, 40 Am. Bankr. Rep. 641; Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665; Buttz v. James, 33 N. D. 162, 156 N. W. 547.

[173] Lavender v. Bowen (Iowa) 101 N. W. 760.

[174] Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Kayserm, 177 Fed. 383, 100 C. C. A. 615, 24 Am. Bankr. Rep. 174; Rutland County Nat. Bank v. Graves, 156 Fed. 168, 19 Am. Bankr. Rep. 446; In re Burnstine, 131 Fed. 828, 12 Am. Bankr. Rep. 596; Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899 (affirmed, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437); Conley v. Nelin (Tex. Civ. App.) 128 S. W. 424; Barnard v. Davis, 54 Ala. 565; Vowinkel v. Moser, 213 Pa. St. 587, 63 Atl. 130. But if a conveyance was made with an intent on the part of the bankrupt to defraud his creditors, it is voidable, though free from any moral turpitude. Reed v. Chase (Mass.) 130 N. E. 257.

[175] Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207. See Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678.

[176] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58, 20 Am. Bankr. Rep. 115; In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am.

good faith and for the honest purpose of discharging a debt, and in the expectation that by so doing the person could continue in business, cannot be set aside as a fraudulent transfer, whatever may be the effect on the other creditors,[177] nor would it be voidable where a fair and honest sale of property was made with the particular view of keeping out of bankruptcy.[178] Such a transaction might indeed be voidable as a preference, but that would be under a different provision of the bankruptcy act and would require, on the part of the creditor receiving it, knowledge or reasonable cause to believe that a preference was intended. On similar principles, though a man is insolvent, he may give to his wife a reasonable and suitable amount of money for current household expenses,[179] and a transfer of exempt property is not voidable by the trustee.[180] But a conveyance of property by a debtor for the purpose of compelling a creditor to compromise, by the hindrance and delay thereby occasioned, is voidable as to all creditors.[181]

§ 460. Same; Intention as to Future Creditors.—A conveyance or transfer by a person who afterwards becomes bankrupt may be avoided by the trustee as a fraud upon creditors whose claims accrued after the conveyance or transfer, that is, if it was made by the bankrupt with the expectation of incurring future debts and with a distinct purpose to hinder or defraud those who should subsequently become his creditors.[182] But this cannot be the case with regard to debts which the bankrupt then did not expect to incur or creditors whose existence he then had no reason to anticipate.[183] Questions of this kind, however, most frequently arise where a person puts his property in the name of his wife or children, and afterwards incurs debts and becomes bankrupt.

Bankr. Rep. 668; Johnson v. Barrett (D. C.) 237 Fed. 112, 38 Am. Bankr. Rep. 464; Boise v. Talcott (C. C. A.) 264 Fed. 61, 45 Am. Bankr. Rep. 117; Jackson v. Jetter, 160 Iowa, 571, 142 N. W. 431; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 Pac. 338. The law implies a fraudulent intent from a debtor's conveyance with a secret trust reserved for his benefit. Devorkin v. Security Bank & Trust Co., 243 Fed. 171, 156 C. C. A. 37, 39 Am. Bankr. Rep. 738. A mortgage given by a bankrupt to secure advances to be made to a corporation of which he was an officer and stockholder, and on whose paper he was indorser, to be used in carrying out contracts in which he was vitally interested, is not necessarily fraudulent nor preferential. Angle v. Bankers' Surety Co. (D. C.) 210 Fed. 289, 32 Am. Bankr. Rep. 71; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284.

[177] Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198. And see Richardson v. Germania Bank, 263 Fed. 320, 45 Am. Bankr. Rep. 351.

[178] Darby v. Lucas, 1 Dill. 164, Fed. Cas. No. 3,573; Mercer v. Warfield's Guardian, 1 Ky. Law Rep. 273.

[179] Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

[180] Bohannon v. Clark, 78 S. W. 479, 25 Ky. Law Rep. 1710.

[181] Voorheis v. Blanton, 89 Fed. 885, 32 C. C. A. 384.

[182] Greil v. Durr, 203 Ala. 644, 84 South. 743; Lummis v. Crosby, 176 App. Div. 315, 162 N. Y. Supp. 444; Calkins v. Lichtig, 251 Fed. 844, 164 C. C. A. 60, 42 Am. Bankr. Rep. 306.

[183] Greil v. Durr, 203 Ala. 644, 84 South. 743.

It is clearly held that a person who is free from debt, or at any rate abundantly able to meet such debts as he may have, may convey property without consideration to his wife or child, by way of settlement, gift, or advancement, and subsequent creditors cannot attack the transfer merely on the ground of its being voluntary. If it was made in good faith and without any fraudulent purpose at the time, it is not voidable though the grantor thereafter contracts debts, becomes insolvent, and is thrown into bankruptcy.[184] But if a person is engaged in a hazardous business and fears loss, and conveys property to his wife or children as an anchor to protect his family in case of insolvency, or if he takes this course because he is about to embark in new enterprises or speculations and means to secure his property against seizure for the debts which he expects to contract, then the transfer is fraudulent as to those who subsequently become his creditors and will be voidable by his trustee in bankruptcy.[185] "In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene, the settler proposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable."[186]

§ 461. **Consideration.**—A sale, assignment, or mortgage of property by one who is afterwards adjudged a bankrupt is not voidable at the instance of his trustee if the purchaser or mortgagee took the same in good faith and gave a present consideration fairly proportioned to the value of the property, irrespective of the motive or purpose of the bankrupt.[187] This rule rests not only upon the explicit provisions of

[184] Warren v. Moody, 122 U. S. 132, 7 Sup. Ct. 1063, 30 L. Ed. 1108; Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599; Herring v. Richards, 1 McCrary, 570, 3 Fed. 439; Sedgwick v. Place, 5 Ben. 184, 5 N. B. R. 168, Fed. Cas. No. 12,620; Jones v. Clifton, 2 Flip. 191, 18 N. B. R. 125, Fed. Cas. No. 7,457; Anonymous 1 Wall. Jr. 107, Fed. Cas. No. 474.

[185] Beasley v. Coggins, 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801; United States v. Griswold, 7 Sawy. 311, 8 Fed. 556; Barker v. Smith, 2 Woods, 87, 12 N. B. R. 474, Fed. Cas. No. 986; Scott v. Mead, 37 Fed. 865; Sedgwick v. Place, 12 Blatchf. 163, 10 N. B. R. 28, Fed. Cas. No. 12,621; Burdick v. Gill, 2 McCrary, 486, 7 Fed. 668; Antrim v. Kelly, 4 N. B. R. 587, Fed. Cas. No. 494; Case v. Phelps, 39 N. Y. 164, 5 N. B. R. 452; Caller v. McNabb, Fed. Cas. No. 2,322. Compare In re Foss, 147 Fed. 790, 17 Am. Bankr. Rep. 439.

[186] Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

[187] Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; In re Baar, 213 Fed. 628, 130 C. C. A. 292; National Bank of Goldsboro v. Hill (D. C.) 226 Fed. 102; In re Paul, 260 Fed. 114, 171 C. C. A. 150; Phillips v. Carter (D. C.) 266 Fed. 444, 46 Am. Bankr. Rep. 33; Lewis v. Julius (D. C.) 212 Fed. 225, 31 Am. Bankr. Rep. 515; Sullivan v. Myer, 137 Tenn. 412, 193 S. W. 124; Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044; Anderson v. J. O. & N. B. Chenault, 208 Fed. 400, 125 C. C. A. 616, 31 Am. Bankr. Rep. 349; Vollmer v. Plage, 186 Fed. 598, 26 Am. Bankr. Rep. 590;

the bankruptcy act,[188] but is also supported by sound reason, because the net result of such a transaction is not to impair the remedies of creditors nor to diminish the aggregate of the assets upon which they may have recourse for the satisfaction of their claims.[189] Even a sale by an insolvent trader of his entire stock in trade, if for its full value, and without any marks of secrecy, haste, or intent to defraud or prefer, cannot be impeached in his subsequent bankruptcy.[190] Although it may be proved or admitted that the transfer was made with intent to defraud creditors, yet if it is also established that the purchaser acted in good faith, then the only question for decision is whether the price paid was a present fair consideration.[191] But the fact of payment and the amount of the consideration must be clearly and fully established by satisfactory evidence.[192]

The consideration may be cash or solvent credit.[193] It may consist in the surrender of securities of equal value,[194] or real property deeded in exchange for other land,[195] or the assumption of the unpaid balance of purchase money due on the property transferred,[196] or the relinquishment of a dower interest in the bankrupt's lands, at least to the extent of the value of the dower released.[197] Marriage may be a good consid-

In re McCord (C. C. A.) 174 Fed. 820, 23 Am. Bankr. Rep. 164; Perry v. Avery, 148 Mich. 211, 111 N. W. 746; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Rosenfeld v. Siegfried, 91 Mo. App. 169; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; Friedman v. Verchofsky, 105 Ill. App. 414; Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657, 3 Ann. Cas. 785; In re Pusey, 7 N. B. R. 45, Fed. Cas. No. 11,478; In re Keefer, 4 N. B. R. 389, Fed. Cas. No. 7,636; Flournoy v. Newton, 8 Ga. 306. Where the bankrupt executed a mortgage to induce the defendant to make advances to a construction company, a misapplication of the advances by an officer of the company, with the consent of the bankrupt, furnishes no ground to avoid the mortgage. Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90.

188 Bankruptcy Act 1898, § 69d, e.

189 For instance, where land purchased with the separate funds of the bankrupt's wife was conveyed to the bankrupt without the consent of the wife, under a promise that the bankrupt would immediately reconvey the land to his wife, who had no knowledge that the conveyance had not been properly made to her in the first instance until shortly before the bankrupt in fact reconveyed the land prior to the bankruptcy, it was held that such reconveyance was not fraudulent as against the trustee in bankruptcy. Young v. Allen, 207 Fed. 318, 125 C. C. A. 68, 30 Am. Bankr. Rep. 261.

190 In re Strenz (D. C.) 8 Fed. 311.

191 Montgomery v. McNicholas (D. C.) 138 Fed. 956, 15 Am. Bankr. Rep. 93.

192 Greensfelder v. Corbett, 190 Ill. 565, 60 N. E. 847.

193 Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12; Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605, 36 Am. Bankr. Rep. 452. A mortgage given by one subsequently bankrupt, to induce persons to indorse his note so that he could obtain a loan, is not a preference or fraudulent conveyance. In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284.

194 Shaffer v. Fritchery, 4 N. B. R. 518, Fed. Cas. No. 12,697; First State Bank v. Sibley County Bank, 96 Minn. 456, 105 N. W. 485, 489; Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 436, 34 Am. Bankr. Rep. 510. See In re Farrand (D. C.) 235 Fed. 809, 38 Am. Bankr. Rep. 101.

195 Hoffman v. Chicago Title & Trust Co., 198 Ill. 452, 64 N. E. 1027.

196 Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12. See Gray v. Breckheimer, 193 App. Div. 231, 183 N. Y. Supp. 748.

197 Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648;

eration for a transfer of property, but not where the gift to the wife consists of house furnishings of large value bought on credit, she having knowledge of the husband's insolvency, and the whole transaction being part of a scheme to defraud his creditors,[198] nor where the woman had a husband living and was therefore incapable of entering into the marriage contract with the bankrupt.[199] So, past services rendered by a relative in the capacity of a housekeeper, which were given gratuitously at the time and not regarded as the foundation of any indebtedness, cannot support a transfer of property as against the trustee in bankruptcy.[200] And in a suit by the trustee to recover the consideration for an annuity purchased by the bankrupt in fraud of creditors, the payments to begin several years later, the execution of the insurance company's executory contract does not constitute a payment of value which would prevent a termination of the contract and recovery of the consideration.[201]

A mortgage, deed of trust, or other form of security, based solely upon an antecedent debt and without any new consideration, is voidable if given within four months before bankruptcy, because it lacks the saving element of a "present fair consideration," because it operates as a preference, and because it is constructively fraudulent, since it removes from the reach of general creditors part of the assets to which they might have had recourse.[202] Where the mortgagor or other lien is given partly to secure an old debt, but partly also in consideration

Baldwin v. Kingston (D. C.) 247 Fed. 163, 40 Am. Bankr. Rep. 641; Greil v. Durr, 203 Ala. 644, 84 South. 743.

[198] Hosmer v. Tiffany, 54 Misc. Rep. 402, 105 N. Y. Supp. 1055. Where the value of property transferred by a bankrupt to his wife was not disproportionate to his pecuniary obligation to support her, in a suit by his trustee against the wife to set aside the conveyance as in violation of the Bankruptcy Act, the equitable doctrine that, where the consideration for a conveyance is inadequate, the conveyance will be sustained to the extent of the consideration actually given, has no application. Baldwin v. Kingston, 257 Fed. 554, 168 C. C. A. 538, 44 Am. Bankr. Rep. 12.

[199] Hosmer v. Tiffany, 115 App. Div. 303, 100 N. Y. Supp. 797.

[200] Bartlett v. Mercer, 8 Ben. 439, Fed. Cas. No. 1,078.

[201] Smith v. Mutual Life Ins. Co., 178 Fed. 510, 24 Am. Bankr. Rep. 514.

[202] Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; William Firth Co. v. South Carolina Loan & Trust Co., 122 Fed. 569, 59 C. C. A. 73; Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co., 67 N. J. Eq. 602, 60 Atl. 940; Lehrenkrauss v. Bonnell, 138 App. Div. 493, 122 N. Y. Supp. 866; In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490; Gillespie v. McKnight, 3 N. B. R. 468, Fed. Cas. No. 5,435; Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119; In re Petersen (D. C.) 252 Fed. 849, 40 Am. Bankr. Rep. 653. But see Hagar v. Watt (D. C.) 232 Fed. 373, 36 Am. Bankr. Rep. 370. Compare Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473, holding that there is nothing inherently fraudulent in a bankrupt's recognizing and paying a debt honestly due to his wife, though it is barred by limitations. That a transfer by a failing husband to his wife, though absolute in form, was in fact a mortgage, does not show that it was fraudulent, where she did not claim the value of the property, but only a lien for a debt. Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52.

of fresh advances, it will constitute a valid lien to the extent of the new consideration (if otherwise unimpeachable) but no further.[203] And indeed, although the consideration may consist wholly of a present loan or advance of money, without including any past debts, still the mortgage will be sustainable in bankruptcy only to the extent of the money actually advanced, with proper interest, not to the extent of an exaggerated or fictitious value recited in the notes or mortgage.[204]

Where the transaction in question is a sale of goods, it will be voidable in bankruptcy if the price paid was so inadequate that it cannot be regarded as a "fair consideration."[205] But if the transfer was made in good faith and for a valuable consideration, it is not necessary, in order to save it, to show strictly that the price paid was fully equal to the value of the property, provided it was not so inadequate as to amount in itself to an actual fraud on creditors.[206] Or, as otherwise stated, the sale will not be set aside on this ground unless there was such a gross inadequacy of price as would put the purchaser upon inquiry as to the fraudulent intent of the seller in disposing of the goods,[207] or such as would impress him with the conviction that the sale could not have been made in good faith.[208]

§ 462. Knowledge, Bad Faith, or Participation of Transferee.—A transfer or incumbrance of property cannot be set aside, although the party making it is insolvent at the time and is adjudged bankrupt within four months, if the person receiving it, in addition to giving a present fair consideration, is a "purchaser in good faith,"[209] even though

[203] In re Grocers' Baking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150; City Nat. Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236, 6 Am. Bankr. Rep. 311; Phillips v. Kahn, 96 App. Div. 166, 89 N. Y. Supp. 250; Asbury Park Building & Loan Ass'n v. Shepherd (N. J. Eq.) 50 Atl. 65; Bankruptcy Act 1898, § 67d, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[204] In re Sawyer (D. C.) 130 Fed. 384, 12 Am. Bankr. Rep. 269; Jackson v. Sedgwick (C. C.) 189 Fed. 508, 26 Am. Bankr. Rep. 836.

[205] Ott v. Doroshow (D. C.) 147 Fed. 762, 17 Am. Bankr. Rep. 417; Myers v. Fultz, 124 Iowa, 437, 100 N. W. 351; Gans v. Weinstein, 83 App. Div. 358, 82 N. Y. Supp. 280.

[206] Meservey v. Roby, 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529. A sale by the directors of a bankrupt corporation shortly before its bankruptcy may be held valid, notwithstanding a subsequent offer of a slightly increased price. In re Copiag-Lindenhurst Co. (D. C.) 240 Fed. 431, 39 Am. Bankr. Rep. 412.

[207] Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

[208] Myers v. Fultz, 124 Iowa, 437, 100 N. W. 351.

[209] Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339, 31 Am. Bankr. Rep. 407; Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52; Young v. Allen, 207 Fed. 318, 125 C. C. A. 68, 30 Am. Bankr. Rep. 261; Shelton v. Price (D. C.) 174 Fed. 891, 23 Am. Bankr. Rep. 431; Chicago Title & Trust Co. v. First Nat. Bank, 174 Ill. App. 339; Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044; Knisely v. People's Sav. Bank, 199 Mich. 501, 165 N. W. 673; Coleman v. Dana, 191 Mo. App. 370, 178 S. W. 256; Pratt v. Christie, 95 App. Div. 282, 88 N. Y. Supp. 585; Kennedy v. Pierce's Loan Co., 100 Mo. App. 269, 73

a fraudulent intent on the part of the bankrupt to cheat or obstruct his creditors is fully made out.[210] But on the other hand, if the purchaser or incumbrancer acted in collusion with the bankrupt, participated in his fraudulent purpose, or even had a guilty knowledge of it, the sale or lien cannot stand as against the trustee in bankruptcy.[211] Knowledge on the part of the purchaser or lienor, such as will defeat the transaction, is knowledge that the bankrupt is not acting in good faith and with an honest purpose but is seeking to gain an advantage for himself by defeating or obstructing his creditors,[212] or, as otherwise stated, knowledge that there are equitable claims upon the property in question such as should prevent the debtor from disposing of it in the way and at the price intended.[213] This knowledge may be constructive as well as actual. If there are any circumstances attending the transaction sufficient to arouse the suspicions of an ordinarily careful and prudent person, then the purchaser is bound to exercise ordinary diligence in making and pursuing inquiries in order to ascertain whether or not the seller can make a transfer of the property which will not be in violation of the bankruptcy law, and he will be chargeable with any knowledge which such reasonable inquiries would have revealed.[214] Thus, a voluntary transfer of all his property by a person in failing or insolvent condition is a circumstance so out of the ordinary as to put

S. W. 357; Clarke v. Sherman, 128 Iowa, 353, 103 N. W. 982; Bunnell v. Bronson, 78 Conn. 679, 63 Atl. 396; Lewis v. First Nat. Bank, 46 Or. 182, 78 Pac. 990. Compare Beecher v. Clark, 12 Blatchf. 256, 10 N. B. R. 385, Fed. Cas. No. 1,223.

[210] In re Benjamin, 140 Fed. 320, 15 Am. Bankr. Rep. 351; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998. Compare Sherman v. Luckhardt, 67 Kan. 682, 74 Pac. 277; Lehrenkrauss v. Bonnell, 138 App. Div. 493, 122 N. Y. Supp. 866; Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521; Illoway v. Daly, 65 Pa. Super. Ct. 333.

[211] McAtee v. Shade (C. C. A.) 185 Fed. 442, 26 Am. Bankr. Rep. 151; Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162, 2 N. B. R. 655; Crump v. Chapman, 1 Hughes, 183, 15 N. B. R. 571, Fed. Cas. No. 3,455. And see Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712. Compare Lyon v. Wallace, 221 Mass. 351, 108 N. E. 1075. And see Reed v. Chase (Mass.) 130 N. E. 257.

[212] In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476, 8 Am. Bankr. Rep. 45; Houck v. Christy, 152 Fed. 612, 81 C. C. A. 602, 18 Am. Bankr. Rep. 330. A deed of trust executed to secure a present advancement by the beneficiary, with knowledge of the bankrupt's insolvency, in order to take up notes held by a pressing creditor, with knowledge that foreclosure would result in the reduction of the value of the bankrupt's assets, the payment of a preferred debt, and failure to pay other debts, is constructively fraudulent and invalid under the Bankruptcy Act. Dean v. Davis, 212 Fed. 88, 128 C. C. A. 658, 31 Am. Bankr. Rep. 808.

[213] Friedman v. Verchofsky, 105 Ill. App. 414.

[214] In re Moody, 134 Fed. 628, 14 Am. Bankr. Rep. 272; In re Calvi, 185 Fed. 642, 26 Am. Bankr. Rep. 206; McWilliams v. Thomas (Tex. Civ. App.) 74 S. W. 596; Gans v. Weinstein, 37 Misc. Rep. 209, 75 N. Y. Supp. 155; Lumpkin v. Foley (C. C. A.) 204 Fed. 372, 29 Am. Bankr. Rep. 673; Lewis v. Julius (D. C.) 212 Fed. 225, 31 Am. Bankr. Rep. 515; Blake v. Thwing, 185 Ill. App. 187. Contra, see Chambers v. Continental Trust Co. (D. C.) 235 Fed. 441, 38 Am. Bankr. Rep. 78.

the transferee upon inquiry, though he himself acted in good faith, and if he could have discovered by such inquiry that it was the purpose of the grantor to defraud his creditors and secure the property for himself and his children, the transfer will be held void.[215] The same rule applies where a bankrupt merchant sells his entire stock of goods. Mere personal good faith on the part of the purchaser is not enough to save the transaction. He should inquire into the transaction to see if a fraud upon creditors is intended, and if he omits to do so, he does not occupy the position of a bona fide purchaser.[216] And mortgaging an entire stock of goods is an act out of the ordinary course of business, and is evidence of the mortgagor's intention to hinder and delay creditors, and charges the mortgagee with notice that the mortgagor is insolvent.[217] But a mortgagee is not to be charged with knowledge of a fraudulent purpose on the part of the debtor merely because he is aware that a large part of the money borrowed is to be used in paying outstanding unsecured debts,[218] nor merely because he has acted as attorney for the bankrupt.[219] On the other hand, where a mortgagor of chattels is selling off the goods for his own use with the consent of the mortgagee, the latter is not a bona fide holder of the mortgage.[220]

An even stronger case is presented where the person taking the property, or acquiring a lien on it, acted in collusion with the seller or mortgagor, not only knowing of his fraudulent purpose, but joining in the transaction for the purpose of assisting him in carrying it out. Here the sale or lien is voidable at the instance of the trustee in bankruptcy, even though it was based upon an honest debt or though the purchaser gave full value.[221] In this connection, an agreement to withhold the deed or mortgage from the record is a suspicious circumstance and one which requires explanation. It is not of itself such evidence of a fraudulent purpose as to constitute fraud in law, and so to warrant setting aside the conveyance or mortgage without more, but it is a fact which constitutes more or less cogent evidence of a want of good

[215] Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284.

[216] Bentley v. Young (D. C.) 210 Fed. 202, 31 Am. Bankr. Rep. 506.

[217] Pierre Banking & Trust Co. v. Winkler, 39 S. D. 454, 165 N. W. 2.

[218] Van Iderstine v. National Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652, 29 Am. Bankr. Rep. 478; In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476, 8 Am. Bankr. Rep. 45.

[219] Webb v. Manheim, 109 App. Div. 63, 95 N. Y. Supp. 1003.

[220] Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413; Pierre Banking & Trust Co. v. Winkler, 39 S. D. 454, 165 N. W. 2.

[221] Gorham v. Buzzell, 178 Fed. 596, 24 Am. Bankr. Rep. 440; In re Kyte, 182 Fed. 166, 25 Am. Bankr. Rep. 337; In re Pease, 129 Fed. 446, 12 Am. Bankr. Rep. 66; E. S. Bonnie & Co. v. Perry's Trustee, 117 Ky. 459, 78 S. W. 208; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612; Babbitt v. Walbrun, 6 N. B. R. 359, Fed. Cas. No. 695. And see In re Groezinger, 199 Fed. 935, 28 Am. Bankr. Rep. 732.

faith, according to the particular situation of the parties and the intent as indicated by all the facts and circumstances of the case.[222]

§ 463. Rights and Liabilities of Transferees.—When a sale or incumbrance of property is set aside at the instance of the trustee in bankruptcy as fraudulent in fact, the buyer or lienor having taken in bad faith, with knowledge of the circumstances, or having participated in the bankrupt's fraudulent purpose, such transferee is not entitled to retain any portion of the property, or to receive credit for property or money actually advanced, in other words, he loses any consideration which he may have given for the transfer.[223] Neither is he entitled to reimbursement for the cost of improvements made on the property or for money advanced to reduce incumbrances.[224] And the fact that the fraudulent vendee of real property, prior to accepting an absolute transfer of it from the bankrupt, held a mortgage upon the same property will not entitle him to a lien thereon.[225] But if the transferee acted in good faith, having no knowledge of the fraudulent design of the bankrupt and giving value, and it is therefore decided that the transfer is not void in toto, but only voidable to the extent of the excess of the value of the property over the consideration given, then the transferee is entitled to be protected to the extent of the actual present consideration paid or given,[226] and the trustee cannot have the sale or mortgage

[222] Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; Cowan v. Burchfield, 180 Fed. 614, 25 Am. Bankr. Rep. 293; Dean v. Plane, 195 Ill. 495, 63 N. E. 274.

[223] Feilbach Co. v. Russell, 233 Fed. 412, 147 C. C. A. 348, 37 Am. Bankr. Rep. 285; In re Friedman (D. C.) 241 Fed. 603, 39 Am. Bankr. Rep. 777; Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718; Blake v. Thwing, 185 Ill. App. 187; Johnson v. Cohn, 39 Misc. Rep. 189, 79 N. Y. Supp. 139; Rosenbluth v. De Forrest & Hotchkiss Co., 85 Conn. 40, 81 Atl. 955; Holloway v. Brame, 83 Miss. 335, 36 South. 1; Allen v. French, 180 Mass. 487, 62 N. E. 987; Jackson v. Sedgwick, 193 Fed. 374; Scammon v. Hobson, 1 Hask. 406, Fed. Cas. No. 12,434. A creditor to whom a bankrupt has granted a preference cannot surrender part of the property received in partial reduction of the damages sustained by the estate in bankruptcy. Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119. But a purchaser of property of a corporation within four months prior to the adjudication of the corporation in bankruptcy, who complied with a request of the seller's president by applying a portion of the purchase price toward discharging personal debts incurred for the corporation's benefit, cannot be required to make such payments a second time to the corporation's trustee in bankruptcy. Doughty v. Moors, 41 Cal. App. 664, 183 Pac. 199.

[224] In re Liller, (D. C.) 253 Fed. 845, 42 Am. Bankr. Rep. 621; In re Mead, 19 N. B. R. 81, Fed. Cas. No. 9,365. Compare Sloss v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 159; In re Bradley (C. C.) 263 Fed. 446, 45 Am. Bankr. Rep. 30.

[225] Railton v. Chicago Title & Trust Co., 125 Ill. App. 617, affirmed 224 Ill. 485, 79 N. E. 600. See Utah Ass'n of Credit Men v. Jones, 49 Utah, 519, 164 Pac. 1029.

[226] In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251; Golden & Co. v. Loving, 42 App. D. C. 489; Payne v. Sehon, Stevenson & Co., 81 W. Va. 128, 94 S. E. 34; Jackson v. Sedgwick, 189 Fed. 508, 26 Am. Bankr. Rep. 836; In re Chase, 133 Fed. 79, 13 Am. Bankr. Rep.

cancelled and recover the specific property without returning the consideration received,[227] or giving bonds to secure the transferee for the amount that is found to be due to him.[228] And even though a transfer is set aside as being fraudulent as to the creditors of the grantor, still it may remain good as between the parties to it. Thus, where a deed of land from the bankrupt to his wife is vacated as voluntary and therefore fraudulent, still the wife is entitled to a homestead allowance out of the proceeds of the property.[229] And if the trustee in bankruptcy sues the transferee for the value of the property and recovers a judgment, and the transferee thereupon pays the judgment, he becomes invested with full title to the property itself, in so far as title was vested in the bankrupt or the trustee.[230]

It is sometimes impossible for the fraudulent transferee to restore the property to the trustee in the condition in which he received it, as, for instance, in consequence of a loss by fire. In this case, the rule appears to be that the proceeds of insurance on a building which stood on land which had been conveyed to the insured in fraud of the grantor's creditors do not take the place of the property destroyed, and the grantor's trustee in bankruptcy may not recover them.[231]

Where an assignment of a cause of action constitutes an unlawful preference in bankruptcy, but no steps are taken in the bankruptcy court to set it aside, it is not subject to collateral attack by a defendant in an action of fraud by the assignor to the use of the assignee.[232]

§ 464. Rights of Bona Fide Purchasers.—Although one may have acquired property under such circumstances that the transfer constituted a fraud upon the creditors of the grantor, and therefore may be unable to hold the property as against the grantor's trustee in bank-

294; Paddock v. Fish, 10 Fed. 125; Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817; Weatherwax v. Gorman, 150 Mich. 316, 113 N. W. 1105. And see Unity Banking & Sav. Co. v. Boyden, 159 Fed. 916, 87 C. C. A. 96, 20 Am. Bankr. Rep. 264. Where, after the execution of a fraudulent bill of sale of a certain vessel, the buyer paid various claims which were valid liens thereon, and after the sale had been adjudged void at the instance of the seller's trustee in bankruptcy, the buyer voluntarily surrendered the vessel to the trustee, it was held that the court had no further jurisdiction to require the trustee to reimburse the buyer to the amount of the liens so paid as a condition to decreeing a delivery to the trustee. Arnold v. Eastin's Trustee, 116 Ky. 686, 76 S. W. 855. As to the right of the grantee or lienor to add interest to the amount of his valid claims, see Dean v. Plane, 195 Ill. 495, 63 N. E. 274; Senft v. Lewis, 239 Fed. 116, 152 C. C. A. 158, 39 Am. Bankr. Rep. 240.

227 Sharood v. Jordan, 90 Minn. 249, 95 N. W. 1108.

228 Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761.

229 Smith v. Kehr, 2 Dill. 50, Fed. Cas. No. 13,071, affirmed in Kehr v. Smith, 20 Wall. 31, 22 L. Ed. 313.

230 Thompson v. Toland, 48 Cal. 99.

231 Trenholm v. Klinker, 108 Miss. 263, 66 South. 738, Ann. Cas. 1917E, 289; Underwood v. Winslow, 234 Mass. 550, 125 N. E. 631.

232 Leonard v. Springer, 174 Ill. App. 516.

ruptcy, yet, until proceedings for its recovery are begun, his title is defeasible only and not absolutely void, and therefore he may in the mean time convey a good and unimpeachable title to a third person, and if the latter took in good faith, gave value, and had no notice of the facts which would invalidate the title of his immediate grantor, the trustee in bankruptcy has no remedy against him.[233] The trustee may indeed proceed against the fraudulent grantee and recover judgment for the value of the property transferred,[234] and if the third purchaser gave a mortgage for part of the price, the trustee in bankruptcy may claim the mortgage and the right to enforce it, as representing the bankrupt's creditors,[235] but in no case should the court decree the setting aside of the conveyance from the bankrupt to his immediate grantee, since this would have the effect to cloud the title of the innocent holder.[236] On the same principle, if a fraudulent grantee of property executes a mortgage on the same to one who lends his money in good faith, on the credit of the mortgagor's apparent title and without notice of any claims which might be asserted against that title by the trustee in bankruptcy of the grantor, the rights of such mortgagee must be fully recognized and protected in the bankruptcy proceedings,[237] provided he has recorded his mortgage before the adjudication in bankruptcy.[238] So also, the bankruptcy law does not prevent a creditor of the fraudulent grantee, without notice, from acquiring rights in the property superior to those of the trustee in bankruptcy of the grantor, as, by levying an attachment on the property.[239] So also, the bona fide purchaser of negotiable paper secured by a mortgage, before maturity and without notice, takes the mortgage, as he does the notes, free from equities arising between the previous parties thereto, and also free from any latent equity existing in a trustee in bankruptcy at the time of the assignment of the notes, of which latent equity there is no

[233] Bush v. Export Storage Co., 136 Fed. 918, 14 Am. Bankr. Rep. 138; Paddock v. Fish, 10 Fed. 125; Jarrell v. Harrell, 1 Woods, 476, 7 N. B. R. 400, Fed. Cas. No. 7,222; Dennett v. Mitchell, Fed. Cas. No. 3,789; Judson v. Kelty, 5 Ben. 348, 6 N. B. R. 165, Fed. Cas. No. 7,567; Coolidge v. Ayers, 76 Vt. 405, 57 Atl. 970; Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12; Union Trust & Savings Bank v. Amery, 72 Wash. 648, 131 Pac. 199; Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; Merrick v. Pattison, 85 Wash. 240, 147 Pac. 1137; Gray v. Breslof (D. C.) 273 Fed. 526.

[234] Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; Gray v. Breslof (D. C.) 273 Fed. 526.

[235] Prescott v. Galluccio, 164 Fed. 618, 21 Am. Bankr. Rep. 229.

[236] Skillin v. Maibrunn, 176 N. Y. 588, 68 N. E. 1124.

[237] Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887; Brooks v. D'Orville, 7 Ben. 485, Fed. Cas. No. 1,951; Sedgwick v. Place, 12 Blatchf. 163, 10 N. B. R. 28, Fed. Cas. No. 12,621; Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90.

[238] Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887.

[239] In re Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224.

notice actual or constructive.[240] And therefore he is entitled to protection and to the benefit of his security, as against the trustee, although his immediate vendor held it under such circumstances of fraud as would have made him liable to an action by the trustee to set aside the security.[241]

But a purchaser from the fraudulent grantee may of course be chargeable with the consequences of the original fraud, if he knew of it. But this must be clearly made out. The mere fact that there was something unusual in the original transaction (as, that it embraced the whole of a stock of goods) may not be enough to charge him with notice.[242] But if he had reasonable cause to believe that the transfer was fraudulent, or was aware of suspicious circumstances and omitted to make proper inquiries, he cannot claim to occupy the position of an innocent purchaser without notice.[243] And although the mere institution of proceedings in bankruptcy does not give constructive notice to third persons that they must be on their guard in dealing with property which the bankrupt had previously conveyed or incumbered, because there may be ground to attack such conveyance or incumbrance as fraudulent,[244] yet after the trustee in bankruptcy has begun his action to set aside a transfer of property as fraudulent, no third person can acquire a good title to it from the defendant in that action.[245]

§ 465. Jurisdiction, Form of Action, Parties, and Pleading.—A suit by a trustee in bankruptcy to set aside an alleged fraudulent conveyance by the bankrupt may be maintained either in the court of bankruptcy or in any state court which would have had jurisdiction of a similar action by the creditors; for this purpose the jurisdiction of the two courts is concurrent.[246] But when the court of bankruptcy has taken

[240] In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700. This rule is firmly settled so far as the federal courts are concerned, by the decision in Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313, though it must be admitted that elsewhere there is considerable conflict of authority upon the question. See Clement v. Saratoga Holding Co., 161 App. Div. 898, 145 N. Y. Supp. 628, holding that the purchaser must bring himself within the definition of a bona fide holder under the Bankruptcy Act, and not merely within the definitions of a state law on the subject of negotiable instruments.

[241] Myers v. Hazzard, 4 McCrary, 94, 50 Fed. 155.

[242] Babbitt v. Walbrun, 1 Dill. 19, 4 N. B. R. 121, Fed. Cas. No. 694. See Faulkner v. Kaplon, 203 Fed. 114. The purchaser of mortgaged premises is not charged with notice of the mortgagor's fraudulent intent as to creditors by his knowledge of the fact that the mortgage was not recorded, that the parties to it were brothers-in-law, that the mortgagor was heavily indebted, or that he retained possession of the property after the mortgage. Kimbrough v. Alred, 202 Ala. 413, 80 South. 617.

[243] Darby v. Lucas, 1 Dill. 164, Fed. Cas. No. 3,573; In re Moody, 134 Fed. 628, 14 Am. Bankr. Rep. 272.

[244] In re Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224; Paddock v. Fish, 10 Fed. 125.

[245] Brewster v. Goff, 164 Fed. 127, 21 Am. Bankr. Rep. 239.

[246] Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669; Carter v. Hobbs, 92 Fed. 594, 1 Am.

jurisdiction, any proceedings in the state court which would interfere with the full exercise of that jurisdiction or with its control of the property in suit may be restrained.[247] Formerly, a suit of this character might also be brought in a federal circuit court.[248] And under the present statute it appears that a non-resident defendant may be sued in the federal district court of the district where he is domiciled, since jurisdiction is given to "any" court of bankruptcy.[249] Where an action of this kind has been begun in a United States court by judgment creditors, its jurisdiction to proceed with the case is probably not affected by the filing of a petition in bankruptcy against the debtor,[250] but it should not take jurisdiction of a creditor's bill when proceedings in bankruptcy have already been commenced.[251]

Since a trustee's suit to set aside a fraudulent transfer of property is in the nature of a creditor's bill, he may appropriately proceed by a bill in equity, notwithstanding the fact that there may be a remedy at law.[252] Or, according to the circumstances of the particular case, he may bring an action for money had and received,[253] or trover,[254] or assumpsit where the goods transferred have been converted into money.[255] But the claims of the trustee against an alleged fraudulent transferee or preferred creditor cannot be determined summarily by the court of bankruptcy on motion and rule.[256] If the trustee, upon his appointment, finds a suit already commenced and in progress in a state court by one or more of the creditors to set aside a fraudulent conveyance by the bankrupt, he may apply to the court of bankruptcy for permission to intervene in such action, and leave will generally be granted if it appears to be for the best interests of the estate.[257]

Bankr. Rep. 215. And see Whittington v. Simmons, 32 Ark. 377. Supra, §§ 410–414.

[247] Kellogg v. Russell, 11 Blatchf. 519, 11 N. B. R. 121, Fed. Cas. No. 7,666.

[248] Woolridge v. McKenna, 8 Fed. 650; Nicholas v. Murray, 5 Sawy. 320, Fed. Cas. No. 10,223.

[249] Bankruptcy Act 1898, §§ 67e, 70e, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[250] National Bank of the Republic v. Hobbs, 118 Fed. 626, 9 Am. Bankr. Rep. 190.

[251] Cruchet v. Red River Min. Co., 155 Fed. 486, 18 Am. Bankr. Rep. 814.

[252] Parker v. Black, 151 Fed. 18, 80 C. C. A. 484, 18 Am. Bankr. Rep. 15; Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408, 4 Am. Bankr. Rep. 659; Cox v. Wall, 99 Fed. 546; Schrenkeisen v. Miller, 9 Ben. 55, Fed. Cas. No. 12,480; In re Hunt, 2 N. B. R. 539, Fed. Cas. No. 6,881; Lisberger v. Garnett, 1 Hughes, 620, Fed. Cas. No. 8,383; Gnichtel v. First Nat. Bank, 66 N. J. Eq. 88, 53 Atl. 1041; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65. Compare Gray v. Beck, 6 Fed. 595. And see Frank v. Musliner, 76 App. Div. 616, 78 N. Y. Supp. 369; Blake v. Thwing, 185 Ill. App. 187.

[253] Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314.

[254] Mowry v. Reed, 187 Mass. 174, 72 N. E. 936.

[255] Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046.

[256] Supra, § 403. See In re Green (D. C.) 207 Fed. 693, 30 Am. Bankr. Rep. 464.

[257] In re Riker, 107 Fed. 96, 5 Am. Bankr. Rep. 720; Kimmouth v. Braeutigam (N. J. Eq.) 57 Atl. 1013; Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; At-

The bankrupt himself is neither a necessary nor a proper party to a bill in equity by his trustee to set aside an alleged fraudulent conveyance or transfer.[258] But where several persons are all connected with various fraudulent undertakings for the purpose of preventing the bankrupt's property from reaching the control of the trustee, although they are not all connected with each fraudulent act, but some of them performed one act and some another, all tending to the same result, the trustee may join them all in one suit to obtain possession of the property involved.[259] But in a suit to recover a preferential transfer only those persons who have received some benefit or advantage from it are proper defendants.[260]

As to matters of pleading and practice, the trustee's suit will be governed by the laws and rules of the court where it is brought, and where that is a federal court, the suit is treated as one in equity and will be governed by the rules of pleading and practice in equity, independently of the state practice.[261] But in any case, the trustee's bill or complaint must set forth specifically all the facts and circumstances necessary to show the nature of the transaction in controversy and its fraudulent character.[262] Thus, as a basis for the suit, the bill must show that there were creditors existing at the time of the transfer which is attacked, or else allege such a fraudulent intent as would make the transfer or conveyance void as against subsequent creditors; and it must state the aggregate amount of the claims proved in the bankruptcy proceedings and aver that the assets are not sufficient to satisfy such claims; but it is not necessary to name the unsecured creditors whom

kins v. Globe Bank & Trust Co. (Ky.) 124 S. W. 879; Tharp v. Tharp's Trustee (Ky.) 119 S. W. 814. See Davis v. W. F. Vandiver & Co., 143 Ala. 202, 38 South. 850.

[258] Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Benton v. Allen, 2 Fed. 448; Huntington v. Saunders, 14 Fed. 907.

[259] Potts v. Hahn, 32 Fed. 660; Jones v. Slauson, 33 Fed. 632; Strasburger v. Bach, 157 Fed. 918, 19 Am. Bankr. Rep. 732; Norcross v. Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718.

[260] Page v. Moore, 179 Fed. 988, 24 Am. Bankr. Rep. 745.

[261] Westall v. Avery, 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 673.

[262] Flanders v. Coleman, 250 U. S. 223, 39 Sup. Ct. 472, 63 L. Ed. 948, 43 Am. Bankr. Rep. 563; In re McIntosh, 150 Fed. 546, 80 C. C. A. 250, 18 Am. Bankr. Rep. 169; Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669; Comstock v. Tracey, 46 Fed. 162; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; Crim v. Rice, 232 Fed. 570, 146 C. C. A. 528, 37 Am. Bankr. Rep. 320; Kimbrough v. Alred, 202 Ala. 413, 80 South. 617; Ury v. Van Every, 181 Cal. 604, 188 Pac. 985; McKey v. Cochran, 262 Ill. 376, 104 N. E. 693. A bill by the trustee of a bankrupt corporation to recover the amount paid by the corporation on an accommodation note in fraud of its creditors while insolvent, is insufficient if it does not allege that the holder knew of the fraud. Gullege v. Woods, 108 Miss. 233, 66 South. 536. If a trustee, suing to recover property fraudulently transferred, seeks to recover property subsequently acquired by the transferee as the proceeds of the transferred property, the complaint must show the necessary facts. Hane v. Crown & Keystone Co (D. C.) 223 Fed. 439, 35 Am. Bankr. Rep. 175.

the trustee represents nor to specify or describe their respective debts.[263] The bill must also offer to do equity. For instance, if the transaction was fraudulent only in part, the defendant being entitled to retain or receive what he gave in the way of a present valid consideration, the trustee must offer in his bill to pay the defendant what may equitably be due to him.[264]

Such a bill, seeking to set aside a chattel mortgage and a sale thereunder, and also an assignment for the benefit of creditors, as fraudulent against creditors, and to recover the property, is not multifarious, its object being to recover the estate and clear it of incumbrances, and all the acts of the defendants having been done with a common purpose.[265] The answer should deny specifically the essential allegations of the bill,[266] and may plead any proper defense, but it is not necessarily a defense that the property is already in the possession of the trustee, having been seized by the marshal,[267] nor that the bankrupt's discharge was granted notwithstanding opposition to it on the ground of the same alleged fraudulent transaction.[268] As to pleading the statute of limitations as a defense, it was formerly held that the trustee could not maintain the suit if a similar action by creditors would have been barred by the state statute.[269] But since his title is based on the bankruptcy act, and since the operation of that act cannot be in any way affected by state legislation, it is thought that the only applicable statute of limitations is that contained in the bankruptcy act itself, to the effect that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." [270]

§ 466. Burden of Proof and Evidence.—In a suit to set aside an alleged fraudulent transfer of property, the trustee must assume the burden of proving the fraud charged by clear and satisfactory evidence.[271]

[263] Cartwright v. West, 185 Ala. 41, 64 South. 293; Barrett v. Kaigler, 200 Ala. 404, 76 South. 320; Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[264] Albert Pick & Co. v. Natalby, 211 Ill. App. 486.

[265] Platt v. Preston, 19 N. B. R. 241, Fed. Cas. No. 11,219. And see O'Farrell v. Poston, 105 S. C. 30, 89 S. E. 483.

[266] Prestridge v. Wallace, 155 Ala. 540, 46 South. 970.

[267] Kellogg v. Russell, 11 Blatchf. 519, 11 N. B. R. 121, Fed. Cas. No. 7,666.

[268] Jones v. Milbank, 6 Lans. (N. Y.) 73.

[269] Jones v. Smith, 38 Fed. 380; Martin v. Smith, 1 Dill. 85, 4 N. B. R. 274, Fed. Cas. No. 9,164. And see Lehman v. La Forge, 42 Fed. 493.

[270] Bankruptcy Act 1898, § 11d. And see Bean v. Brookmire, 1 Dill. 25, 4 N. B. R. 196, Fed. Cas. No. 1,168.

[271] Osley v. Adams (C. C. A.) 268 Fed. 114, 46 Am. Bankr. Rep. 40; Reed v. Chase (Mass.) 130 N. E. 257; Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90; Johnstone v. Babb, 240 Fed. 668, 153 C. C. A. 466, 38 Am. Bankr. Rep. 715; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284; In re Grocers' Baking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150; French v. Cunningham (C. C. A.) 261 Fed. 909, 44 Am. Bankr. Rep. 534; Murray v. Ray, 251 Fed. 866, 164 C. C. A. 82, 42 Am. Bankr. Rep. 315; Peterson v. Mettler, 198 Fed. 938, 29 Am. Bankr. Rep. 158; Jacobs v. Van Sickel, 123 Fed. 340, 10 Am. Bankr. Rep.

A purpose to hinder or defraud creditors, and knowledge thereof on the part of the transferee, cannot be presumed from the bare fact of a conveyance of property by one who was then insolvent and afterwards becomes bankrupt,[272] though proof of highly suspicious facts in connection with the transfer or in the conduct of the parties may make out a prima facie case of fraud.[273] But the fact alone that a sale is made out of the usual course of business of the debtor is not sufficient to stamp the transaction as fraudulent, though it may be a badge of fraud, depending for its effect on the surrounding facts.[274] In this connection, the trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a state court declaring the transfer or conveyance by the debtor to have been fraudulent and void,[275] and every declaration of the bankrupt in reference to defrauding his creditors and acts on his part showing the nature and intent of the fraudulent scheme are admissible where a prima facie case of conspiracy is made out.[276] And it may be shown that, eight days after another sale made a month before the sale in question, a secret agreement was entered into between the parties whereby the vendor was reinvested with an interest in the property sold.[277] But evidence of transactions with others than the transferee in question, proper to be considered in deter-

519; Benton v. Allen, 2 Fed. 448; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Klein v. Gallin, 141 N. Y. Supp. 831; Smith v. Eldredge, 143 N. Y. Supp. 87; Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25; Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976; Sharood v. Jordan, 90 Minn. 249, 95 N. W. 1108; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Falls City Tinware Co.'s Trustee v. Levine, 104 S. W. 716, 31 Ky. Law Rep. 1103; Coleman v. Hagey (Mo.) 158 S. W. 829; Horine v. Luria, 49 Pa. Super. Ct. 171; Gilmore v. Wall, 31 Okl. 754, 123 Pac. 1060; McCrory v. Donald, 192 Ala. 312, 68 South. 306; McKey v. Cochran, 262 Ill. 376, 104 N. E. 693; Finch v. Cecil, 170 N. C. 114, 86 S. E. 991; Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665; Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969; Jones v. Shiro, 116 Me. 512, 102 Atl. 76. In a suit by a trustee in bankruptcy to reach property transferred by the bankrupt to his wife, the mere fact that neither husband nor wife was called by the defense, does not sustain the plaintiff's burden of showing a secret trust. Lyon v. Wallace, 221 Mass. 351, 108 N. E. 1075.

[272] Webb's Trustee v. Lynchburg Shoe Co., 106 Va. 726, 56 S. E. 581; Dutton v. Cloar, 26 Tex. Civ. App. 547, 65 S. W. 70; Love v. Export Storage Co., 143 Fed. 1, 74 C. C. A. 155, 16 Am. Bankr. Rep. 171. Compare Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473. And see Fouche v. Shearer, 172 Fed. 592, 22 Am. Bankr. Rep. 828; Phillips v. Huffaker, 35 Cal. App. 531, 170 Pac. 431.

[273] In re Hunt, 2 N. B. R. 539, Fed. Cas. No. 6,881. In a creditors' suit against the members of an insolvent banking firm, to set aside alleged fraudulent transfers of the bank's assets the failure of the defendants to produce the important books of the bank when required, or to account for the same, raises a presumption of fraud of the most damaging character. National Bank of Republic v. Hobbs, 118 Fed. 626, 9 Am. Bankr. Rep. 190.

[274] Houck v. Christy, 152 Fed. 612, 81 C. C. A. 602, 18 Am. Bankr. Rep. 330; Babbitt v. Walbrun, 1 Dill. 19, 4 N. B. R. 121, Fed. Cas. No. 694.

[275] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815.

[276] Tyler v. Angevine, 15 Blatchf. 536, Fed. Cas. No. 14,306.

[277] Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395.

mining the bankrupt's intention, or as bearing on the question of his insolvency, is not admissible against the transferee without evidence that he had knowledge of such transactions.[278] So, evidence of what the bankrupt said to the defendant some days before, when he borrowed the money of him, as to what he wanted it for, or of statements then made by the bankrupt as to his financial condition, or of the time fixed for repayment, has no bearing on the question whether the defendant knew or had reasonable cause to believe the bankrupt was insolvent when he repaid the loan.[279] And testimony that the bankrupt secreted the money which he received on the sale in question, for the purpose of defrauding his creditors, does not show that the defendant had any knowledge of such fraudulent intent.[280] And so, where a bill of sale is attacked as fraudulent, evidence that the bankrupt secreted certain of his property is not admissible except for the purpose of showing what goods were on hand at the date of the bill of sale.[281] And generally, the trustee's case must fail where the only witnesses introduced, who were the parties to the transaction attacked, all testify that the transfer was made in good faith and for a fair consideration.[282]

It is also necessary for the trustee to prove that there were creditors of the bankrupt whose claims were in existence at or before the time of the transaction assailed as fraudulent, or else that he had, at that time, a fraudulent intention as to those who might afterwards become his creditors.[283] Likewise the trustee must not only allege but prove that the assets of the estate in bankruptcy are not sufficient to satisfy the claims against it, and on this point, evidence as to all the claims, whether secured or unsecured, will be admissible.[284]

It is also incumbent on the trustee to prove, by competent and satisfactory evidence, that the bankrupt was insolvent at the time of the transaction in question and that the transferee knew of it or had sufficient cause to believe it.[285] The insolvency may be shown by the books

[278] Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483.

[279] Goodrich v. Wilson, 119 Mass. 429, But see Johnson v. Canfield-Swigart Co., 292 Ill. 101, 126 N. E. 608.

[280] Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

[281] Frank v. Musliner, 76 App. Div. 616, 78 N. Y. Supp. 369.

[282] Entwisle v. Seidt, 155 Fed. 864, 19 Am. Bankr. Rep. 185.

[283] In re Snodgrass, 209 Fed. 325, 126 C. C. A. 251, 31 Am. Bankr. Rep. 601; Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829; Longbottom v. Emery, 261 Pa. 163, 104 Atl. 561; Scales v. Holje, 41 Cal. App. 733, 183 Pac. 308.

[284] Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[285] Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Gans v. Weinstein, 83 App. Div. 358, 82 N. Y. Supp. 280; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761; Way v. Ruff, 112 Minn. 57, 127 N. W. 564, 609; Moran v. Morgan, 252 Fed. 719, 164 C. C. A. 559, 42 Am. Bankr. Rep. 430. Compare Senft v. Lewis, 239 Fed. 116, 152 C. C. A. 158, 39 Am. Bankr. Rep. 240.

of the bankrupt, including private memorandum books,[286] or by the debtor's schedules in bankruptcy, if filed shortly after the transfer in question,[287] but not if filed more than a year after the transaction which is alleged to have been fraudulent.[288] Evidence that a bankrupt, while insolvent, conveyed valuable property to his brother for an inadequate consideration, that by agreement between them the brother withheld the deeds from record, and that the bankrupt afterwards borrowed large sums of money on his representation that he owned such property, will be sufficient to establish actual fraud and entitle the bankrupt's trustee to recover the property.[289] Where the transfer attacked is a payment of money, it is not necessary to trace it to the present possession of the defendant.[290] Where the trustee's contention is that the bankrupt conspired with several other persons to secure or convert his property, and withdraw it from the reach of the creditors, he will establish his case by proof that any two of the defendants acted in concert in the fraudulent scheme, though he may be unable to prove that all of the defendants were parties to the conspiracy.[291]

On the other hand, at least when the trustee has made out a prima facie case, the defendant must assume the burden of proving that he was a purchaser for value and in good faith and for a fair consideration.[292] For this purpose he must be allowed to present all competent evidence bearing on the question of the good faith of the transaction and the consideration given.[293] And he is not estopped from claiming that the conveyance in question was valid as to him by the fact that

[286] In re E. S. Wheeler & Co., 158 Fed. 603, 85 C. C. A. 425, 19 Am. Bankr. Rep. 641.

[287] Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. Supp. 372.

[288] Barr v. Sofranski, 130 App. Div. 783, 115 N. Y. Supp. 533.

[289] Peterson v. Mettler, 198 Fed. 938, 29 Am. Bankr. Rep. 158.

[290] Smith v. Mutual Life Ins. Co. (C. C.) 178 Fed. 510, 24 Am. Bankr. Rep. 514.

[291] McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; Gregory v. Binghamton Trust Co., 168 App. Div. 805, 154 N. Y. Supp. 376; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. Supp. 372.

[292] Owens v. Daniel, 230 Fed. 101, 144 C. C. A. 399, 36 Am. Bankr. Rep. 433; Klinger v. Hyman, 223 Fed. 257, 138 C. C. A. 499, 34 Am. Bankr. Rep. 338; Harvey v. Stowe, 219 Fed. 17, 134 C. C. A. 635; Rison v. Parham, 219 Fed. 176, 134 C. C. A. 550, 33 Am. Bankr. Rep. 571; Stroecker v. Patterson, 220 Fed. 21, 135 C. C. A. 597, 34 Am. Bankr. Rep. 287; Sturdivant Bank v. Schade, 195 Fed. 188, 115 C. C. A. 140, 27 Am. Bankr. Rep. 673; Harper v. Sanderson (D. C.) 264 Fed. 857, 45 Am. Bankr. Rep. 579; In re Musica (D. C.) 263 Fed. 156, 44 Am. Bankr. Rep. 628; Winslow v. Staab (D. C.) 233 Fed. 305, 36 Am. Bankr. Rep. 626; Bentley v. Young (D. C.) 210 Fed. 202, 31 Am. Bankr. Rep. 506; Pope v. Cantwell (D. C.) 206 Fed. 908, 30 Am. Bankr. Rep. 802; Lawrence v. Lowrie (D. C.) 133 Fed. 995, 13 Am. Bankr. Rep. 297; Garland v. Arrowood, 177 N. C. 371, 99 S. E. 100; McNamara v. Farnsworth, 106 Wash. 523, 180 Pac. 466; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Eberline v. Prager, 209 Mich. 322, 176 N. W. 428; Lockhart v. Edge, 40 S. D. 307, 167 N. W. 164; Wick v. Hickey (Iowa) 103 N. W. 469.

[293] Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489. The bona fide character of a conveyance by a failing husband to his wife may be established by the uncorroborated, but uncontradicted, testimony

the adjudication in bankruptcy was based upon an allegation that it was a fraudulent conveyance and an act of bankruptcy,[294] nor by the fact that the same transaction was specified as a ground of opposition to the bankrupt's application for discharge.[295] The question whether or not the conveyance or transfer drawn in question was fraudulent is a question of fact,[296] which must go to the jury.[297]

§ 467. **Nature and Extent of Trustee's Recovery.**—In the case of a fraudulent conveyance of real property, vacated at the suit of the trustee in bankruptcy, the plaintiff is entitled to a decree declaring and establishing the title as vested in him,[298] or requiring the defendant to execute the necessary deed.[299] In the case of a fraudulent transfer of a note and mortgage, the trustee is entitled to an order requiring that they shall be assigned to him.[300] If the property transferred was a certificate of corporate stock, and it still remains in the hands of the defendant, he may be required to surrender the certificate itself to the trustee in bankruptcy and to account for dividends received.[301] If the property in controversy consisted of chattels, they are to be delivered in specie to the trustee.[302] And generally, if it is in the power of the fraudulent transferee to restore the status quo by delivering to the trustee the identical property which he received from the bankrupt, this is the relief which the trustee must seek and obtain, and he cannot abandon the pursuit of the property itself and simply have a judgment in personam for its value against the defendant.[303] In the case of a fraudulent payment of money, however, the natural and only appropriate judgment is one against the transferee personally for the sum shown to have been received by him.[304] Where the transfer assailed consisted in the assign-

of the husband or wife. Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52.

[294] In re Marter, 12 N. B. R. 185, Fed. Cas. No. 9,143.

[295] Bradley v. Hunter, 50 Ala. 265.

[296] Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Webb's Trustee v. Lynchburg Shoe Co., 107 Va. 807, 60 S. E. 130.

[297] Coolidge v. Ayers, 76 Vt. 405, 57 Atl. 970; Dutton v. Cloar, 26 Tex. Civ. App. 547, 65 S. W. 70; Sherman v. Luckhardt, 96 Mo. App. 320, 70 S. W. 388.

[298] Currie v. Look, 14 N. D. 482, 106 N. W. 131. And see Bergin v. Blackwood, 145 Minn. 363, 177 N. W. 493.

[299] McFarland v. Goodman, 6 Biss. 111, 11 N. B. R. 134, Fed. Cas. No. 8,789.

[300] Clarke v. Sherman, 128 Iowa, 353, 103 N. W. 982.

[301] Wasey v. Holbrook, 141 App. Div. 336, 125 N. Y. Supp. 1087. See In re Kessler & Co., 174 Fed. 906, 23 Am. Bankr. Rep. 391.

[302] Edwards v. Schillinger Bros. Co., 153 Ill. App. 219.

[303] Phillips v. Sedgwick, 95 U. S. 3, 24 L. Ed. 591; Wasey v. Holbrook, 141 App. Div. 336, 125 N. Y. Supp. 1087; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696. But if the surrender of certificates of corporate stock (the property fraudulently transferred) would offer insufficient relief because of their depreciation in value, the court may render a personal judgment against the transferee. Wasey v. Holbrook, 65 Misc. Rep. 84, 120 N. Y. Supp. 675. And see Gill v. Ely-Norris Safe Co., 170 Mo. App. 478, 156 S. W. 811.

[304] Andreas' Assignee v. Rust, 3 Ky. Law Rep. 772; Greenhall v. Carnegie Trust Co. (D. C.) 180 Fed. 812, 25 Am.

ment of a judgment, the collection of the judgment should not be enjoined, but the court should direct payment to be made to the trustee in bankruptcy.[305]

But if the property has passed into the possession of a bona fide holder for value, taking by assignment or transfer from the original fraudulent transferee without notice, so that it can no longer be reclaimed or recovered by the trustee in bankruptcy, then the appropriate relief of the latter is a judgment for damages against the fraudulent grantee, measured by the value of the property,[306] and including, in the case of real estate, the rents and profits which he received or should have received from it while in his hands.[307] The value of the property, for the purpose of the trustee's recovery, is not measured by the price the fraudulent transferee paid for it,[308] nor necessarily by its estimated value at the time of the transfer, but rather by the price for which he sold it to the present holder.[309] In this sense and to this extent, he may be held to account for any profit he made out of the property.[310] Thus, for instance, where a new corporation, organized to succeed the bankrupt, took the latter's assets under a lease which was void for fraud as against creditors, and operated the bankrupt's property for a considerable period, the corporation is not to be considered as a mere trespass-

Bankr. Rep. 300; Smith v. Mutual Life Ins. Co. (C. C.) 158 Fed. 365, 19 Am. Bankr. Rep. 707. The trustee's recovery should be limited to the amount by which the assets of the estate have been depleted by the transaction complained of. Continental & Commercial Trust & Sav. Bank v. Breen & Kennedy, 188 Ill. App. 467. But chattel mortgagees who had wrongfully foreclosed cannot complain because the mortgagor's trustee in bankruptcy recovers a judgment for the value of the property which exceeds the claims filed in the court of bankruptcy, especially if the judgment provides that any surplus left after administering the bankrupt's estate shall be returned to the mortgagees. Simpson v. Combes, 107 Wash. 575, 182 Pac. 566.

[305] Barnard v. Davis, 54 Ala. 565.

[306] Skillin v. Maibrunn, 176 N. Y. 588, 68 N. E. 1124; Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. Supp. 1014; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

[307] Gray v. Chase, 184 Mass. 444, 68 N. E. 676.

[308] In re Denson (D. C.) 195 Fed. 854, 28 Am. Bankr. Rep. 158. In a suit to recover property sold under execution within four months before bankruptcy, or its value, the value at the time of the execution sale should be adopted as the basis for the decree. Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 36 Am. Bankr. Rep. 199. Where the bankrupt spent his money in making improvements on the land of another, with the latter's consent, knowing that he did not retain sufficient property to satisfy his creditors, the lien of the trustee in bankruptcy on the land is merely for the increased value by reason of such improvements, and not for the amount actually expended. Garland v. Arrowood, 179 N. C. 697, 103 S. E. 2. Where a corporation never received any consideration for a note given to one of its directors, he is liable to the company's trustee in bankruptcy for the amount he has received on account of the note, with interest. Schmid v. Neuberger, 174 App. Div. 670, 160 N. Y. Supp. 701.

[309] Russell v. Powell, 38 Wash. 651, 80 Pac. 837.

[310] Shuman v. Fleckenstein, 4 Sawy. 174, 15 N. B. R. 224, Fed. Cas. No. 12,826. See Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

er, but is liable in an accounting for its acts under the lease for the net profits earned after allowance of expenditures other than taxes.[311]

In the case of a joint purchase, fraudulent and voidable under the bankruptcy act, each purchaser is liable for the full value of the property, although they were interested in different proportions.[312] But where the actual purchaser was only acting as agent for another, and surrendered the property to his principal, it would be error to make an order requiring the agent to turn over the property to the trustee.[313] So where the fraudulent transaction consisted of a sale of the bankrupt's property and application of the proceeds to the discharge of an unrecorded chattel mortgage, and the trustee's action is to set aside the sale, the court should not adjudge that the mortgage be canceled, the mortgagee not being a party to the suit, and the mortgage not being void to the extent that it evidenced a debt, though not a lien against subsequent creditors.[314] It should also be remarked in this connection that, as against the trustee in bankruptcy, the wife of the bankrupt is not barred or estopped to claim dower by reason of her having joined her husband in a deed which is fraudulent as to creditors, and which has for that reason been set aside at the instance of the trustee. When the deed is decreed to be fraudulent and void at the suit of the trustee, he cannot set it up to defeat the right of the wife to dower. "Such a position involves this inconsistency, viz., that it asks that the same instrument be held void as to creditors, and then, in their favor, held valid as to the wife." [315]

§ 468. Rights of Creditors in Property or Fund Recovered.—It is well settled that when the trustee in bankruptcy procures a fraudulent conveyance or transfer of property of the bankrupt to be set aside, and the property subjected to the payment of the provable debts in bankruptcy, this will inure to the benefit of all the creditors of the bankrupt having provable claims, including those whose claims accrued subsequent to the transfer, and not merely to the advantage of those who, as existing creditors, or holding judgment, would have been entitled to attack the conveyance at the time it was made.[316] Thus, a fraudu-

[311] In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769.

[312] Schulenburg v. Kabureck, 2 Dill. 132, Fed. Cas. No. 12,487.

[313] In re Denson, 195 Fed. 854, 28 Am. Bankr. Rep. 158.

[314] E. S. Bonnie & Co. v. Perry's Trustee, 117 Ky. 459, 78 S. W. 208.

[315] Cox v. Wilder, 2 Dill. 45, 7 N. B. R. 241, Fed. Cas. No. 3,308.

[316] Globe Bank & Trust Co. v. Martin, 236 U. S. 289, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162; Kehr v. Smith, 20 Wall. 31, 22 L. Ed. 313; Platt v. Mead, 9 Fed. 91; In re Lowe, 19 Fed. 589; Smith v. Kehr. 2 Dill. 50, 7 N. B. R. 97, Fed. Cas. No. 13,071; Pratt v. Curtis, 2 Low. 87, 6 N. B. R. 139, Fed. Cas. No. 11,375; White v. Jones, 6 N. B. R. 175, Fed. Cas. No. 17,550; Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957; Maffi v. Stephens, 49 Tex. Civ. App. 354, 108 S. W. 1008. See, also, In re Martin, 193 Fed. 841, 113 C. C. A. 627, 27 Am. Bankr. Rep. 545; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Allen v.

lent conveyance being good as between the parties to it, a judgment thereafter recovered does not attach as a lien on the property, and when it is vacated at the suit of the trustee, there is no superior equity, or right to prior satisfaction, in a creditor who holds a judgment.[317] So, a creditor's bill instituted subsequent to an adjudication in bankruptcy against the debtor, to set aside a chattel mortgage and a sale of a stock of merchandise, does not give rise to a lien in favor of the creditor filing the same on the goods sought to be reached.[318]

McMannes, 156 Fed. 615, 19 Am. Bankr. Rep. 276; Shaver v. Mowry, 262 Pa. 381, 105 Atl. 505; Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[317] Neal v. Foster, 36 Fed. 29; Wood v. Wright, 9 Biss. 365, 4 Fed. 511. See Pool v. Ragland, 57 Ala. 414.

[318] Moore-Schafer Shoe Mfg. Co. v. Billings, 46 Or. 401, 80 Pac. 422.

CHAPTER XXIV

SALES OF PROPERTY BY TRUSTEES

§ 469. Authority of Trustees and Orders of Court.—Before the appointment of a trustee in bankruptcy, the court has authority to order the sale of particular assets of the bankrupt if special circumstances render it necessary or desirable.[1] But when a trustee is appointed he becomes invested by operation of law with title to all the non-exempt property of the bankrupt and is charged with the duty of reducing the same to money. This applies to all property in the possession of the bankrupt when the proceedings were instituted.[2] Property salable by the trustee may thus include such diverse items as, for instance, a mining lease,[3] the equity or right of redemption in property of the bankrupt which has been sold on foreclosure,[4] and a right of action against a railroad for damages to property in transit.[5] Where a promissory note becomes the property of an estate in bankruptcy, it is said that title thereto cannot be passed in any other way than by a sale in bankruptcy.[6] The personal medical and surgical practice and good will of a bankrupt as a physician are not subject to sale by his trustee, although his proper-

[1] In re Hitchings, 4 N. B. R. 384, Fed. Cas. No. 6,542; In re Vila, Fed. Cas. No. 16,941. And see supra, § 217.

[2] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88; Gee v. Parks (Tex. Civ. App.) 193 S. W. 767.

[3] In re Barnhardt Coal & Limestone Co. (D. C.) 265 Fed. 385, 44 Am. Bankr. Rep. 170.

[4] In re Ohio Copper Mining Co. (D. C.) 237 Fed. 490, 38 Am. Bankr. Rep. 548.

[5] Southern Ry. Co. v. Avey, 173 Ky. 598, 191 S. W. 460.

[6] Segen v. Fabacher, 136 La. 568, 67 South. 369.

ty interest in a practice and good will purchased from another may be so sold.[7]

As it is the duty of the trustee to sell every right, title, interest, or claim of the bankrupt to which he can give a title, and for which he can find a purchaser, it is held that property conveyed in fraud of creditors more than four months prior to the filing of the petition in bankruptcy may be sold by the trustee, and the purchaser will take such title as the trustee may have had, together with the right to institute an action in his own name to set aside the fraudulent conveyance.[8] But this does not apply to the right to recover property transferred by the bankrupt as a preference, since it is the clear intention of the Bankruptcy Act that no one but the trustee can maintain such an action.[9] The trustee, however, may and should sell even contingent, uncertain, or litigated claims, if any one will pay a substantial price for them.[10] If he fails or refuses to sell available assets for the benefit of the creditors, he may be held personally responsible.[11] But the power of the trustee to sell and convey the bankrupt's estate is wholly statutory, and a sale otherwise than as the statute directs will not be valid.[12] If the sale is to be private instead of public, or if the property is incumbered with valid liens, the trustee must have an order of the court to authorize it, and if he proceeds without such an order, the sale is a nullity.[13] But except in these cases, he may and should proceed on his own responsibility, and no special order of court is necessary to enable him to give a good title.[14] General directions as to the conduct of bankruptcy sales are given in the statute and the general orders,[15] and the particular court of bankruptcy may make a standing rule or order prescribing when and how such sales are to be held, and in ordinary cases, the trustee needs no further or specific authority or direction.[16] It is otherwise, however, when the trustee has never gained possession of the property in question and the title is in litigation. If such property can be sold at all, it may only be done

[7] In re Myers, 208 Fed. 407, 125 C. C. A. 569, 31 Am. Bankr. Rep. 24.

[8] In re Downing, 201 Fed. 93, 119 C. C. A. 431, 29 Am. Bankr. Rep. 228; Strong v. Durdle, 94 Wash. 157, 162 Pac. 6. Contra, Neuberger v. Felis, 203 Ala. 142, 82 South. 172.

[9] Lovell v. Latham & Co. (D. C.) 211 Fed. 374, 32 Am. Bankr. Rep. 191.

[10] In re Gutterson (D. C.) 136 Fed. 698, 14 Am. Bankr. Rep. 495. And see In re Crouse (D. C.) 196 Fed. 907, 28 Am. Bankr. Rep. 540.

[11] In re Jackson, 2 N. B. R. 508, Fed. Cas. No. 7,127.

[12] Wisner v. Brown, 50 Mich. 553, 15 N. W. 901.

[13] In re Eden Musee American Co. (D. C.) 230 Fed. 925, 36 Am. Bankr. Rep. 111.

[14] In re La France Copper Co. (D. C.) 205 Fed. 207, 30 Am. Bankr. Rep. 381; Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; In re White, 2 Ben. 85, Fed. Cas. No. 17,531; Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551.

[15] Bankruptcy Act 1898, § 70b; General Order No. 18.

[16] Farmers' Loan & Trust Co. v. Eno, 35 Fed. 89; In re La France Copper Co., 205 Fed. 207, 30 Am. Bankr. Rep. 381.

under an order of the court of bankruptcy, made on the trustee's petition and after notice to the parties claiming adversely.[17]

If, for any reason, a special order of the court is sought and obtained for the sale, it should fix the time and place of the sale. It would be irregular and void for omitting these details,[18] but not because it does not fix an upset price for the property.[19] An order of this kind is administrative rather than judicial; it is not to be relied on as an adjudication that the property in question belonged to the bankrupt.[20] For the purpose of making such an order, the referee is the court and may exercise its full powers,[21] and the trustee's petition for authority to sell should be filed with the referee and not with the clerk of the court.[22] In the case of joint trustees, all should join in the petition. But in a case where the creditors irregularly elected two trustees instead of three, and the two so chosen presented a petition for authority to sell assets, and afterwards the creditors appointed a third trustee, it was held that the irregularity was cured by his joining in the petition.[23] The pendency of composition proceedings may prevent a sale of the bankrupt's assets, if all

[17] See Shaw v. Lindsey, 60 Ala. 344; In re Ludwigson, 3 Woods, 13, Fed. Cas. No. 8,601; Knight v. Cheney, 5 N. B. R. 305, Fed. Cas. No. 7,883; Stanley v. Sutherland, 54 Ind. 339. A sale by the trustee of property of the bankrupt which has never come into his possession, but is in the possession of another, claiming a lien thereon, though confirmed by the bankruptcy court, does not vest in the buyer the title and right to immediate possession necessary to maintain trover. American Bottle Co. v. Finney, 203 Ala. 92, 82 South. 106.

[18] Osborn v. Baxter, 4 Cush. (Mass.) 406.

[19] Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. Instead of directly ordering a sale, the court may direct the trustee to receive bids and submit them to the court with recommendations. In re Glas-Shipt Dairy Co., 239 Fed. 122, 152 C. C. A. 164, 38 Am. Bankr. Rep. 554.

[20] Wilkins v. Tourtellott, 28 Kan. 825. But a sale of personal property by a trustee in bankruptcy, acting under an order of sale issued by the court, is a "judicial sale." Carney v. Averill, 110 Me. 172, 85 Atl. 494; American Bottle Co. v. Finney, 203 Ala. 92, 82 South. 106. In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the court of bankruptcy is without jurisdiction to cite into court a mortgagee of such land and adjudicate upon the validity of his mortgage, without his consent and over his objection. In re Henderson (D. C.) 206 Fed. 139, 30 Am. Bankr. Rep. 468. But an adverse claimant of property, which is also claimed by the trustee in bankruptcy, has no standing to object to an order directing the trustee to sell his "right, title, and interest" in the property. In re Vanoscope Co., 244 Fed. 445, 157 C. C. A. 71, 40 Am. Bankr. Rep. 70.

[21] In re Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54; In re Bank of North Carolina, 19 N. B. R. 164, Fed. Cas. No. 896; In re Styer, 98 Fed. 290, 3 Am. Bankr. Rep. 424. But it is said (in the case last cited) that if the property is in the hands of a receiver at the time of the adjudication in bankruptcy, an order for its appraisement and sale can be made only by the judge sitting as the court of bankruptcy. An order for the sale of property of a bankrupt is none the less an order of court because signed by the judge. There is no practical distinction in a court of bankruptcy between an order of the judge and an order of the court, because the court in bankruptcy is always open, and whenever the judge acts, wherever he may be, the act is the act of the court. In re Mott, 6 Fed. 685.

[22] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

[23] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

has been done that is necessary to make the composition effective.[24] But on the other hand, the sale is not void merely because it does not follow immediately after the order authorizing it, nor even because so long a period as six years is allowed to elapse.[25] But when the trustee once sells particular property at public auction, he divests himself of all title to it, and an attempted second sale thereafter is entirely void.[26] It remains to be added that where the bankrupt's assets include a stock of liquors, the trustee may sell them in bulk without being obliged to take out a license or pay a tax under either state or federal laws.[27]

§ 470. Sale of Incumbered Property.—Where the real estate of a bankrupt is incumbered by valid liens, the trustee may sell it either subject to the incumbrances or absolutely and free therefrom. But in the latter case, he must, before selling, obtain from the bankruptcy court an order for that purpose; and if he sells the property without such order, he can only sell it subject to the incumbrances, and the purchaser will take no better title than the bankrupt had; that is, he will take only the bankrupt's equity of redemption, or take the property subject to the liens.[28] And where property is thus sold subject to liens, by order of the court of bankruptcy, it passes out of its jurisdiction, and the state courts may then proceed to enforce the liens,[29] and by ordering and confirming a sale under a mortgage, the bankruptcy court exhausts its jurisdiction, so as to invalidate a subsequent sale under a purported vendor's lien.[30] If the trustee obtains an order for the sale of the property, but the order does not mention liens, it will be construed as only authorizing a sale subject to existing valid liens.[31] But the trustee may petition for and obtain an order directing the sale to be made subject to a

[24] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

[25] Potter v. Martin, 122 Mich. 542, 81 N. W. 424.

[26] Townshend v. Thomson, 60 N. Y. Super. Ct. 454, 18 N. Y. Supp. 870.

[27] In re Becker, 2 Nat. Bankr. News, 225. And see Wildermuth v. Cole, 77 Mich. 483, 43 N. W. 889; State v. Johnson, 33 N. H. 441; Gignoux v. Bilbruck, 63 N. H. 22; Williams v. Troop, 17 Wis. 463.

[28] See v. Rogers, 31 W. Va. 473, 7 S. E. 436; Ray v. Norseworthy, 23 Wall. 238, 23 L. Ed. 116; In re Mebane, 3 N. B. R. 347, Fed. Cas. No. 9,380; In re Addison, 3 Hughes, 430, Fed. Cas. No. 76; Boulware v. Hartsook's Adm'r, 83 Va. 679, 3 S. E. 289; King v. Bowman, 24 La. Ann. 506; In re McClellan, 1 N. B. R. 389, Fed. Cas. No. 8,694; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re States Printing Co., 241 Fed. 245, 154 C. C. A. 165, 38 Am. Bankr. Rep. 722; Charak v. Durphee (D. C.) 252 Fed. 885, 42 Am. Bankr. Rep. 110; Kelly v. Minor, 252 Fed. 115, 164 C. C. A. 227, 41 Am. Bankr. Rep. 275; In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420. One buying property at a bankruptcy sale, subject to the lien of a mortgage thereon, does not thereby assume payment of the mortgage debt, but he becomes the owner of the property subject to the incumbrance. Kerman v. Leeper (Mo. App.) 157 S. W. 984.

[29] Beall v. Walker, 26 W. Va. 741.

[30] J. M. West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648, 116 S. W. 652.

[31] In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291; Ex parte City of Anderson, 82 S. C. 131, 63 S. E. 534.

certain specified lien or incumbrance,[32] or, vice versa, to be made free from a specified lien. In either case, the sale will not divest a superior lien not mentioned in the order and the holder of which was not made a party to the proceeding.[33] But if there is a direction to sell free from first or superior liens, the fact that inferior liens are not mentioned will not prevent their being divested in accordance with the ordinary rule governing judicial sales.[34]

Where other courts have taken full jurisdiction of property on which liens are asserted, the court of bankruptcy will not ordinarily interfere.[35] And where it is reasonably certain that the market value of the property does not exceed the amount of the valid liens upon it, it is not the duty of the trustee to petition for its sale, nor is it a proper exercise of the court's discretion to order it sold.[36] For such a course would result in no benefit to the general creditors, and would amount merely to putting through a sale for the benefit of the lien-holder, saving him the cost of foreclosure and making the expense fall unjustifiably upon the general estate.[37] In such a case, it is entirely proper for the court to order the surrender of the property to the lien creditor, if he will take it in satisfaction of his claim; if not, he should be allowed to foreclose on his own account.[38]

§ 471. Sale Free of Incumbrances.—The court of bankruptcy has power and authority to order the sale of any property of the bankrupt free and clear of all liens or incumbrances then resting upon it, transferring the liens to the fund realized by the sale, or rather, transforming the lien creditors' contractual right into an equity to claim satisfaction out of the proceeds of the sale.[39] But in order to do this, it is absolutely

[32] For form of petition and order for sale of property subject to liens, see Official Form No. 44.

[33] In re McGilton, 3 Biss. 144, 7 N. B. R. 294, Fed. Cas. No. 8,798; Cain v. Sheets, 77 Ala. 492; Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39. In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the bankruptcy court does not have jurisdiction to cite into court a mortgagee of such real estate and adjudicate upon the validity of his mortgage, without his consent or over his objection. In re Henderson, 206 Fed. 139.

[34] McKay v. Hamill (C. C. A.) 185 Fed. 11, 26 Am. Bankr. Rep. 164.

[35] In re Taliafero, 3 Hughes, 422, Fed. Cas. No. 13,736.

[36] In re Rose, 193 Fed. 815, 26 Am. Bankr. Rep. 752; In re Foster, 181 Fed. 703, 25 Am. Bankr. Rep. 96; In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; In re Mebane, 3 N. B. R. 347, Fed. Cas. No. 9,380; In re Ludwigson, 3 Woods, 13, Fed. Cas. No. 8,601; In re Dillard, 2 Hughes, 190, 9 N. B. R. 8, Fed. Cas. No. 3,912; In re Hahnlen, Fed. Cas. No. 5,901; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728.

[37] In re Cogley, 107 Fed. 73, 5 Am. Bankr. Rep. 731.

[38] Equitable Loan & Security Co. v. R. L. Moss & Co., 125 Fla. 609, 60 C. C. A. 345, 11 Am. Bankr. Rep. 111; In re Rose, 193 Fed. 815, 26 Am. Bankr. Rep. 752; In re Lausman, 183 Fed. 647, 25 Am. Bankr. Rep. 186.

[39] Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; In re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260, 23 Am. Bankr. Rep. 822; In re Loveland, 155 Fed. 838, 84 C. C. A. 72, 19 Am. Bankr. Rep. 18; Sturgiss v. Corbin, 141

essential that each lien creditor whose rights may be affected should have personal notice of the trustee's application for an order directing the sale to be made in this manner, and be accorded an opportunity to present any objections he may have,[40] unless his conduct at or after the sale may be taken as a waiver of notice or acquiescence in the order of the court, as, where he was present at the sale and raised no objections,[41] or where he brings trover against the trustee for the conversion of the property sold.[42] The actual consent of the lien creditor to a sale of the property free of liens will of course obviate any possible question as to the jurisdiction and power of the court.[43] But jurisdiction is based upon the court's control over the estate in bankruptcy, and the consent of a creditor is not essential to the authority of the court to decide how the

Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543; In re Leslie-Judge Co. (C. C. A.) 272 Fed. 886, 46 Am. Bankr. Rep. 707; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76; In re West (D. C.) 232 Fed. 903, 37 Am. Bankr. Rep. 421; In re Whiteside (D. C.) 230 Fed. 937, 36 Am. Bankr. Rep. 870; In re Progressive Wall Paper Corp. (D. C.) 222 Fed. 87, 35 Am. Bankr. Rep. 508; In re Pittsburgh-Big Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81; In re Roger Brown & Co., 196 Fed. 758, 28 Am. Bankr. Rep. 336; In re Trayna & Cohn, 195 Fed. 486, 27 Am. Bankr. Rep. 594; In re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248; In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188; In re United States Graphite Co., 161 Fed. 583, 20 Am. Bankr. Rep. 573; In re Keet, 128 Fed. 651, 11 Am. Bankr. Rep. 117; In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472; In re Worland, 92 Fed. 893, 1 Am. Bankr. Rep. 450; In re Mead, 58 Fed. 312; In re Kahley, 2 Biss. 383, 4 N. B. R. 378, Fed. Cas. No. 7,593; In re Kirtland, 10 Blatchf. 515, Fed. Cas. No. 7,851; Sutherland v. Lake Superior Ship Canal, R. & I. Co., 9 N. B. R. 298, Fed. Cas. No. 13,643; In re Rhodes, 3 Pittsb. 340, Fed. Cas. No. 11,746; Giveen v. Smith, 1 Hask. 358, Fed. Cas. No. 5,467; In re Barrow, 1 N. B. R. 481, Fed. Cas. No. 1,057; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965; In re Columbian Metal Works, 3 N. B. R. 75, Fed. Cas. No. 3,039; Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498; Blair v. Carter's Adm'r, 78 Va. 621; Toler v. Crowder, 127 Ark. 552, 192 S. W. 905. The power of a court of bankruptcy to order a sale of the bankrupt's property free from liens is not expressly conferred, but it is necessarily implied, since such a sale is often necessary to the due execution of the power and duty to reduce the assets to money and distribute it to creditors. Gantt v. Jones, 272 Fed. 117.

[40] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; In re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260, 23 Am. Bankr. Rep. 822; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Saxton Furnace Co., 136 Fed. 697, 14 Am. Bankr. Rep. 483; In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; Anonymous, Fed. Cas. No. 456; Ex parte Drewry, 2 Hughes, 435, Fed. Cas. No. 4,081; In re Taliafero, 3 Hughes, 422, Fed. Cas. No. 13,736; In re Major, 2 Hughes, 215, Fed. Cas. No. 8,981; In re Rowland, 2 Hughes, 210, Fed. Cas. No. 12,096; Murphy v. Factors' & Traders' Ins. Co., 33 La. Ann. 454; Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498.

[41] Giveen v. Smith, 1 Hask. 358, Fed. Cas. No. 5,467.

[42] In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291.

[43] Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444; In re Caldwell, 178 Fed. 377, 24

property shall be sold.[44] The mortgagee or other lienor must indeed have notice and a hearing, but he may be brought in by a rule to show cause,[45] and while the court will give due weight to any objections which he may interpose, it is not constrained by them. In other words, the mere fact that a lien creditor objects is not enough to prevent the court from ordering a sale free of incumbrances, if that course shall appear best for the general interests of the estate.[46] So mortgaged chattels may be ordered sold free of liens notwithstanding the fact that the mortgagee has, by his contract, a right to the immediate possession of the goods and desires to avail himself of that right.[47]

When a sale is made under an order of this kind, the purchaser will take an entirely free and unincumbered title,[48] and it is entirely immaterial that the proceeds of the sale may not be sufficient to discharge the various liens on the property or even the senior lien alone.[49] Of course it is for the interest of the mortgagee or other creditor to attend the sale and bid enough to protect himself, or at least to see that the final bid is not less than what he considers the fair market value of the property. If an outsider becomes the purchaser, the rights of the mortgagee or other lienor are transferred to the fund arising from the sale, and as the lien is extinguished, it is not necessary for him to take any further steps in the way of continuing or renewing it.[50]

Am. Bankr. Rep. 495. Where a lienholder accepted service of the petition to sell the property free from liens, it amounted to a consent to that mode of sale. Gugel v. New Orleans Nat. Bank, 239 Fed. 676, 152 C. C. A. 510, 39 Am. Bankr. Rep. 160.

[44] In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738; In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

[45] In re E. A. Kinsey Co., 184 Fed. 694, 106 C. C. A. 648, 25 Am. Bankr. Rep. 651.

[46] In re E. A. Kinsey Co., 184 Fed. 694, 106 C. C. A. 648, 25 Am. Bankr. Rep. 651; In re Howard, 207 Fed. 402.

[47] Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965. And a clause in a mortgage securing bonds, giving the holders the right to bid on their bonds at any foreclosure sale, does not in any way limit the power of a court of bankruptcy to sell the property free from liens. In re Franklin Brewing Co., 249 Fed. 333, 161 C. C. A. 341, 41 Am. Bankr. Rep. 51.

[48] Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116. A sale of a bankrupt's mortgaged property free from liens under an order of the bankruptcy court gives the purchaser the same title as if the sale were made in any other court of equity to foreclose the mortgage or marshal the assets of an insolvent, and his title is good against the privies of the mortgagor and mortgagee, including the wife of the mortgagor when she has renounced her dower. Gantt v. Jones (C. C. A.) 272 Fed. 117, 46 Am. Bankr. Rep. 351. Since in bankruptcy the court can order the sale of the property free from incumbrances, where the mortgagee consents to such sale his lien on the land is wiped out, and no release of the mortgage (as provided in the state statute) is necessary to pass the title. Toler v. Crowder, 127 Ark. 552, 192 S. W. 905.

[49] Houston v. City Bank of New Orleans, 6 How. 486, 12 L. Ed. 526; In re Sanborn (D. C.) 96 Fed. 551, 3 Am. Bankr. Rep. 54.

[50] Gantt v. Jones (C. C. A.) 272 Fed. 117, 46 Am. Bankr. Rep. 351; In re Bradley (C. C. A.) 269 Fed. 784; In re Plantations Co. (D. C.) 270 Fed. 273, 46 Am. Bankr. Rep. 318; Moran v. Schnugg, 7 Ben. 399, Fed. Cas. No. 9,786; Shinn v. Kemp & Hebert, 73 Wash. 254, 131 Pac. 822. Where the trustee in bankruptcy,

The power thus vested in the court of bankruptcy may be exercised by the referee. That is, the referee has authority, in the exercise of a judicial discretion, to order the sale of property free from liens, transferring the claims of lien creditors to the proceeds of sale, and to confirm the sale when made.[51]

But the court of bankruptcy will not order the trustee to sell property free of liens, unless satisfied that the interests of the general creditors will be advanced thereby, by the production of a fund available for their claims over and above the liens, and that the interests of creditors holding liens will not be injuriously affected.[52] The proper inquiry for both the trustee and the court is: On what terms will the property bring most for the creditors, subject to or discharged from the incumbrances upon it?[53] As illustrating the circumstances which may properly influence the court in deciding this question, we may mention a case where a portion of the bankrupt's property was subject to a valid attachment lien, and it appeared that the sale of the attached property by the sheriff would dismember the property and result in destroying its value, while a sale of the whole property by the bankrupt's trustee would enable the creditors to obtain a better price. Here it was held proper to order the sale free from liens.[54] So where, by a prompt sale of the bankrupt's assets, interest accruing on liens thereon and taxes would be saved, and the sale could be made by the trustee with less expense than by the sheriff on foreclosure of the liens, and a sale by the trustee would enable the estate to be settled promptly, without awaiting the outcome of an action by lien creditors to enforce their

knowing the facts creating an equitable lien on property, sold the property and used the proceeds in paying costs of administration primarily chargeable against the general assets, a court of equity, following the maxim that equity will look upon that as done which ought to have been done, will follow the proceeds into the entire mass of the estate, giving the party injured by the unlawful diversion a priority of right over the other creditors. In re Plantations Co. (D. C.) 270 Fed. 273, 46 Am. Bankr. Rep. 318.

[51] In re Miners' Brewing Co., 162 Fed. 327, 20 Am. Bankr. Rep. 717; In re Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54; In re Waterloo Organ Co., 118 Fed. 904, 9 Am. Bankr. Rep. 427.

[52] In re Fayetteville Wagon-Wood & Lumber Co., 197 Fed. 180, 28 Am. Bankr. Rep. 307; In re Shaeffer, 105 Fed. 352, 5 Am. Bankr. Rep. 248; In re Styer, 98 Fed. 290, 3 Am. Bankr. Rep. 424; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472. See Equitable Trust Co. v. Vanderbilt Realty Improvement Co., 155 App. Div. 723, 140 N. Y. Supp. 1008; In re Progressive Wall Paper Corp. (D. C.) 222 Fed. 87, 35 Am. Bankr. Rep. 508.

[53] In re National Iron Co., 10 Phila. (Pa.) 274, 8 N. B. R. 422, Fed. Cas. No. 10,045.

[54] In re United States Graphite Co., 161 Fed. 583, 20 Am. Bankr. Rep. 573. The sale of personalty of a bankrupt separate from the realty, which together constituted and were used as a business plant and were mortgaged as such, thus destroying the business entity of the property, is erroneous. In re Franklin Brewing Co., 249 Fed. 333, 161 C. C. A. 341, 41 Am. Bankr. Rep. 51.

liens, and the bankrupt's wife had quitclaimed her dower in the property to the trustee, these facts were held sufficient to move the court to exercise its discretion to order an immediate sale of the assets free from the liens.[55]

§ 472. What Interests Not Divested.—Since a trustee in bankruptcy can sell no more than the bankrupt himself owned, a sale of real estate by the trustee does not bar or extinguish an inchoate right of dower therein existing in the bankrupt's wife.[56] But as it is highly desirable to make the sale free from such dower right, as the property will ordinarily bring a much better price, the wife's consent to release her dower should be obtained if possible, and in that case she may be compensated by a fair allowance out of the proceeds of the sale.[57] For reasons of another kind, it has generally been held that the liens of state and municipal taxes are not divested by a bankruptcy sale, even though ordered to be made free of all incumbrances,[58] unless, perhaps, as suggested in one of the cases, the revenue officer or other proper representative of the state is made a party to the trustee's application for an order of sale.[59] But in a case where the court of bankruptcy ordered the sale of real estate subject only to a first mortgage thereon, it was held that all other liens were divested, including a lien for taxes, and this,

[55] In re Keet, 128 Fed. 651, 11 Am. Bankr. Rep. 117.

[56] Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; In re Shaeffer, 105 Fed. 352, 5 Am. Bankr. Rep. 248; In re Hays (C. C. A.) 181 Fed. 674, 24 Am. Bankr. Rep. 669; In re Angier, 4 N. B. R. 619, Fed. Cas. No. 388; Dwyer v. Garlough, 31 Ohio St. 158; Kelso's Appeal, 102 Pa. St. 7; Lazear v. Porter, 87 Pa. St. 513, 30 Am. Rep. 380; Worcester v. Clark, 2 Grant (Pa.) 84; Cooper v. Tabor, 8 Wkly. Notes Cas. (Pa.) 341. See Baird v. Winstead, 123 N. C. 181, 31 S. E. 390; Kelly v. Minor, 252 Fed. 115, 164 C. C. A. 227; Haggett v. Jones, 111 Me. 348, 89 Atl. 140; Harlin v. American Trust Co., 67 Ind. App. 213, 119 N. E. 20. Under the law of Pennsylvania, this question is doubtful. There are some decisions holding that, since the 1910 amendment to the Bankruptcy Act, which gives to the trustee in bankruptcy the rights and status of a creditor holding a judgment or other lien, the land of a Pennsylvania bankrupt can be sold free from the dower rights of his wife, such rights under the state laws being subject to the claims of creditors. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670; In re Codori (D. C.) 207 Fed. 784, 30 Am. Bankr. Rep. 453. But the decision in In re Chotiner (D. C.) 216 Fed. 916, is directly to the contrary.

[57] Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494, 3 L. R. A. (N. S.) 923, 15 Am. Bankr. Rep. 599. And see In re Strauch (D. C.) 208 Fed. 842, 31 Am. Bankr. Rep. 36; Carver v. Ward, 81 W. Va. 644, 95 S. E. 828. In a case where the bankrupt's wife had an inchoate dower interest in the surplus proceeds of his lands sold under foreclosure, it was directed that one-third of such surplus should be invested in government bonds, to be held by the clerk after settlement of the estate. In re Munford (D. C.) 255 Fed. 108, 43 Am. Bankr. Rep. 218.

[58] In re Gerry, 112 Fed. 958, 7 Am. Bankr. Rep. 459; In re Keller, 109 Fed. 131, 6 Am. Bankr. Rep. 351; Stokes v. State, 46 Ga. 412, 9 N. B. R. 191, 12 Am. Rep. 588. Compare In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 35 Am. Bankr. Rep. 94.

[59] Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498.

although a statute of the state provided that taxes should be a continuing lien on property notwithstanding a judicial sale of it, unless the proceeds of the sale were sufficient to pay them, where it further appeared that this statute was not enacted until after the creation of the first mortgage and that it was not retroactive.[60] There are some other exceptional cases in which outstanding interests in realty will not be divested by the sale. Thus, a person holding the legal title to lands, but bound under a deed of trust to account to third persons for specific interests therein, conveyed the same to his trustee in bankruptcy. No issues were framed or determined in the court of bankruptcy as between the trustee and such third persons, and at the trustee's sale, the bankrupt repurchased the lands. It was held that the sale did not divest the interests of the third persons, and that the bankrupt took the lands still burdened with the trust.[61] So, where certain realty was conveyed by an alleged fraudulent conveyance from husband to wife, and subsequently they jointly executed a mortgage thereon to a third party, it was held that the subsequent private sale in bankruptcy of the realty in question as the property of the husband could not discharge the land from the lien of the mortgage, since the mortgage was good under the wife's title, which would remain perfect until directly impeached by the husband's creditors.[62]

§ 473. Sale of Perishable Property.—Where property of a bankrupt is of a perishable nature and must be disposed of immediately in order to prevent its dissipation or loss, it may be ordered sold at any time after the filing of the petition in bankruptcy, even before the adjudication,[63] or before the appointment of a trustee.[64] These cases, as well as the more ordinary cases of sales by trustees, are covered by the General Orders in bankruptcy, wherein it is provided that "upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."[65] When the trustee has sold property as perishable, and his action is confirmed by the court on his petition, it is not necessary to state the grounds on which the property, taken as a whole, was

[60] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675.

[61] Roby v. Colehour, 146 U. S. 153, 13 Sup. Ct. 47, 36 L. Ed. 922.

[62] Schwartz v. Kleber (Pa.) 7 Atl. 209.

[63] In re Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

[64] Supra, § 217.

[65] General Order No. 18, par. 3. For form of petition and order for sale of

considered to be in the nature of perishable property.[66] But the court has no power to order the sale of such property unless it is in the possession of the bankrupt or the trustee or of some officer of the court appointed to take charge of it, such as the marshal or a receiver.[67] An order authorizing the receiver of a bankrupt to sell perishable property consisting of produce in storage, "at public or private sale within his discretion, at current rates, without notice," will justify a sale in bulk of all the property in the hands of a warehouseman, after it has been offered in car load lots.[68] An order for the sale of perishable property is within the jurisdiction and authority of the referee in bankruptcy.[69]

§ 474. Land in Another District or State.—As the jurisdiction of the court of bankruptcy embraces all the property of the bankrupt wherever situate, it is not bound by state laws or state lines in ordering its sale. Thus, a state statute providing that lands taken in execution shall be sold in the county where the property is situated has no application to a proceeding in bankruptcy in a federal court, and a trustee in bankruptcy may conduct a sale of land in a county other than that in which the land lies.[70] So the fact that land of a bankrupt may be situated in a state beyond the federal district where the proceedings are pending is no obstacle to converting it into cash for the benefit of the estate. If the trustee has taken possession, it is within the custody of the court of bankruptcy, and the referee has jurisdiction to order its sale free from liens.[71] As to the place where the sale should be conducted, in the case of land in another state, it has been held that the trustee may hold the sale at the place where he would sell any chattel, that is, where the estate is being administered.[72] Generally, however, it would be more advantageous to sell the property where it lies. But when this is done, it is not necessary for the trustee to

perishable property, see Official Form No. 46.

[66] Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

[67] In re Metzler, 1 Ben. 356, 1 N. B. R. 38, Fed. Cas. No. 9,512.

[68] In re Roberts, 166 Fed. 96, 92 C. A. 80, 21 Am. Bankr. Rep. 573.

[69] This appears from Official Form No. 46, which is expressly prepared to be signed by the referee. And see In re Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. It was held otherwise under the act of 1867. See In re Graves, 2 Ben. 100, 1 N. B. R. 237, Fed. Cas. No. 5,709.

[70] James v. Koy (Tex. Civ. App.) 59 S. W. 295. And the Act of Congress of March 3, 1893, requiring sales of land to be made on the property or at the courthouse in the county where the land lies, does not apply to sales in bankruptcy proceedings. In re Britannia Mining Co. (C. C. A.) 203 Fed. 450, 29 Am. Bankr. Rep. 472; In re La France Copper Co., 205 Fed. 207, 30 Am. Bankr. Rep. 381.

[71] In re Wilka, 131 Fed. 1004, 12 Am. Bankr. Rep. 727; Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611; T. E. Wells & Co. v. Sharp, 208 Fed. 393, 125 C. C. A. 609, 31 Am. Bankr. Rep. 344.

[72] Oakey v. Corry, 10 La. Ann. 502. And see In re Britannia Mining Co., 197 Fed. 459, 28 Am. Bankr. Rep. 651.

go in person to the place of sale, in order to be present and superintend it, but he may employ an auctioneer to conduct the sale. It was so held in a case where the land to be sold was situated in Arizona, but the estate in bankruptcy was being administered in Massachusetts.[73]

§ 475. Notice.—The act provides that creditors shall have ten days' notice by mail (unless they waive notice in writing) of all proposed sales of the bankrupt's property.[74] This is in order that they may have an opportunity to appear and show cause against the proposed sale or against the time, place, or terms of sale.[75] But the courts incline to the opinion that the only requirements as to notice of bankruptcy sales which the courts are bound to regard are to be found in the bankruptcy act itself, and therefore that the act of Congress of March 3, 1893, requiring publication of notice of judicial sales once a week for four weeks, does not apply.[76] But when the time fixed by order for the sale has expired without the sale being held, notice to creditors and others interested must be given de novo before a new order of sale is made.[77] In addition to this, all holders of liens on the property and claimants of interests therein must be served with notice or process, which must affirmatively appear by the record, or the sale will be ineffectual to divest their liens or interests.[78] Under the former bankruptcy law it was held that the requirement of notice of the time and place of sale of the bankrupt's real estate was directory only, affecting the accountability of the trustee but not the title of a purchaser in good faith.[79] This may well be the case as to the notice required to be mailed to creditors. But it is otherwise as to adverse claimants and lien holders. Even such an one, however, may waive the objection of a want of notice; and he will be held to have done so where he is personally present at the sale and interposes no objection.[80] The notice for the sale should of course con-

[73] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92.

[74] Bankruptcy Act 1898, § 58a (4).

[75] In re Vila, 5 Law Rep. 17, Fed. Cas. No. 16,941.

[76] Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611; In re Edes, 135 Fed. 595, 14 Am. Bankr. Rep. 382; In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92. But see, contra, In re Britannia Mining Co., 197 Fed. 459, 28 Am. Bankr. Rep. 651.

[77] Allgair v. William F. Fisher & Co., 143 Fed. 962, 75 C. C. A. 148, 16 Am. Bankr. Rep. 278.

[78] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; Ex parte Bryan, 2 Hughes, 273, 14 N. B. R. 71, Fed. Cas. No. 2,061; Moorman v. Arthur, 90 Va. 455, 18 S. E. 869; In re Platteville Foundry & Machine Co, 147 Fed. 828, 17 Am. Bankr. Rep. 291; In re Reading Hat Mfg. Co. (D. C.) 224 Fed. 786, 34 Am. Bankr. Rep. 884; Pace v. Berry, 176 Ky. 61, 195 S. W. 131. And see supra, § 471. Notice to the trustee in a mortgage is enough to give jurisdiction over holders of the bonds secured. Equitable Trust Co. v. Vanderbilt Realty Improvement Co., 155 App. Div. 723, 140 N. Y. Supp. 1008. Stockholders of a bankrupt corporation are not entitled to this notice. In re Witherbee (C. C. A.) 202 Fed. 896, 30 Am. Bankr. Rep. 314.

[79] Crowley v. Hyde, 116 Mass. 589.

[80] Keyser v. Wessel, 128 Fed. 281, 62

tain such particulars, as to the description of the property to be sold, the time and place of sale, and the like, as are ordinarily required in notices of judicial sales or sales by executors or receivers. A notice in bankruptcy, serving in a double capacity, as a notice to creditors that application for a sale of property will be made, and as notice to bidders that they may attend and offer bids, though irregular, will not vitiate the sale, if it is shown that the notice was freely advertised, and it does not appear that further publicity would have produced a better bid.[81] It is also to be observed that, while the statute requires notice to be given to creditors of sales by trustees, it does not require notice to be given of sales by pledgees, and hence a trustee, while acting as receiver, is not chargeable for a sale of pledged collaterals under an order authorizing a public or private sale thereof, without notice to creditors.[82]

§ 476. Manner and Conduct of Sale.—The General Orders provide that "all sales shall be by public auction unless otherwise ordered by the court," but that "upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee."[83] By making this order the Supreme Court must be regarded as having construed the Bankruptcy Act in such a manner as that a court of bankruptcy or a referee has discretionary power to order a private sale of the bankrupt's property, with or without notice:[84] But authorization from the court is strictly necessary. A private sale made by the trustee without an order of the court allowing him so to sell is void.[85] As to the distinction between public and private sales, it is held that there is a "public" sale in bankruptcy, where all persons are permitted to bid, where bids are not held open except with the bidders' consent, and where notice inviting bids is publicly given, though the sale is not made by auction, and is combined with a meeting of the creditors of the bankrupt held for the purpose of enabling such creditors to vote on the acceptance of the bid

C. C. A. 650, 12 Am. Bankr. Rep. 126; In re Caldwell, 178 Fed. 377, 24 Am. Bankr. Rep. 495.

[81] In re Nevada-Utah Mines & Smelters Corp. 198 Fed. 497, 28 Am. Bankr. Rep. 409.

[82] In re James Carothers & Co., 193 Fed. 687, 27 Am. Bankr. Rep. 921.

[83] General Order No. 18. For form of petition and order for sale of real estate at auction, see Official Form No. 42. For form of petition and order for private sale of property, see Official Form No. 45.

[84] In re Hawkins, 125 Fed. 633, 11 Am. Bankr. Rep. 49; In re Edes, 135 Fed. 595, 14 Am. Bankr. Rep. 382; In re Gutterson, 136 Fed. Cas. 698, 14 Am. Bankr. Rep. 495; In re Knox Automobile Co. (D. C.) 210 Fed. 569, 32 Am. Bankr. Rep. 67.

[85] Reid v. Robrecht, 102 Cal. 520, 36 Pac. 875. Compare Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551.

or bids made.[86] It is also a permissible method of conducting a sale in bankruptcy for the trustee, under an order of court, to invite sealed bids for specified property, to be accompanied by certified checks for a certain amount, such bids to be opened in the presence of the referee on a day and at an hour named, and the property to be awarded to the highest bidder, subject to confirmation by the court, upon the hearing and determination of objections, which are directed to be filed by a certain day and appointed to be heard on a designated other day.[87] A petition by the trustee to the bankruptcy court for an order authorizing a meeting of creditors, the object of the meeting being to enable the creditors to act upon any bid for certain property of the bankrupt which may be submitted at the meeting, is irregular, but yet is sufficient to authorize the referee to act upon it, and is sufficient notice that a sale is proposed.[88]

It is a rule applicable to trustees under deeds of trust and similar instruments that any sale of the property must be made by the trustee himself in person,[89] and that he must be present during the whole of the sale.[90] But there is no specific requirement in the bankruptcy act that sales shall be made personally by the trustee, and therefore it is held to be within the power and discretion of the court of bankruptcy to appoint commissioners to make a given sale,[91] or to appoint an auctioneer to sell property of a bankrupt's estate in advance of any particular occasion therefor.[92] The trustee may also employ an auctioneer to cry the sale, but only under the authority of the court.[93]

The time and place of the sale are generally to be fixed by the trustee. And here it should be remembered that it is his duty to sell the property of the estate to the best possible advantage, and to choose a time when there is a good market for the property, wherein he should exercise not only fidelity to his trust, but also good business judgment and sagacity. And if he sacrifices the property by selling at an improper or ill-chosen time, though his intentions were good, he will be liable for the deficiency

[86] In re Nevada-Utah Mines & Smelters Corp., 198 Fed. 497, 28 Am. Bankr. Rep. 409. On appeal in this case ([C. C. A.] 202 Fed. 126, 29 Am. Bankr. Rep. 754), it was held that a sale made under an order passed at a meeting of creditors, according to a notice addressed to "creditors, stockholders, and other parties in interest," but not inviting the public to attend and bid, was a private sale, but was justified in the circumstances of the case.

[87] See In re Chandler (C. C. A.) 194 Fed. 944, 28 Am. Bankr. Rep. 89.

[88] In re Nevada-Utah Mines & Smelters Corp., 198 Fed. 497, 28 Am. Bankr. Rep. 409.

[89] Fuller v. O'Neil, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59.

[90] Brickenkamp v. Rees, 69 Mo. 426.

[91] Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

[92] In re Benjamin, 136 Fed. 175, 69 C. C. A. 191, 14 Am. Bankr. Rep. 481.

[93] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Pegues, 3 N. B. R. 80, Fed. Cas. No. 10,907.

in the proceeds of the sale.[94] Still, the object of the bankruptcy act is an expeditious settlement and distribution of the estate, and the trustee cannot keep the creditors waiting indefinitely in the hope that the property will eventually command a better price. It is his duty to sell the property with all reasonable promptness, unless all the creditors will consent to a delay.[95] But a mere mistake in judgment as to the proper place for the sale will not invalidate it, in the absence of fraud or collusion.[96] In pursuance of his duty to realize as much as possible for the creditors, it is also incumbent upon the trustee not to sell in bulk, but to divide the property into portions, if susceptible of division, and if it will thus command a higher price; if his failure to do this results in a sacrifice of the property, the sale will be set aside.[97] Anything like collusion or an attempt to stifle competition will of course invalidate the sale but this result does not follow because of a private arrangement between the attorney for the purchaser and the auctioneer that the bid of any other person should be raised $50 each time until a sign to stop was given.[98] The property should be sold to the highest bidder, and a "bid" means an offer by a purchaser to pay something to the trustee for the property purchased which the trustee may distribute among creditors.[99] The "highest bidder" is the one who makes the highest bid in good faith. For a trustee is not bound to accept every bid, and the court will always sustain him in refusing bids which would manifestly frustrate the very object and purpose of the sale.[100] And a bid which was not accepted will not give the bidder any standing to complain either of its rejection of a sale to another at a higher price.[101] Generally speaking, the trustee is bound to obtain the best possible price, under the conditions attending the sale, and will be held responsible for any negligence in failing to do so.[102]

[94] See Snyder's Adm'rs v. McComb's Ex'x, 39 Fed. 292; Melick v. Voorhees, 24 N. J. Eq. 305; Holbrook v. Coney, 25 Ill. 543.

[95] Hart v. Crane, 7 Paige (N. Y.) 37.

[96] Hills v. Alden, 2 Hask. 299, Fed. Cas. No. 6,507.

[97] In re Lloyd, 11 Fed. 586; Chesley v. Chesley, 49 Mo. 540; Smith v. Scholtz, 68 N. Y. 41. But a sale of a bankrupt's assets en masse, for a larger sum than was bid for the property in parcels, under the court's order of sale, will be held valid. In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 33 Am. Bankr. Rep. 618.

[98] In re Ketterer Mfg. Co., 156 Fed. 719, 19 Am. Bankr. Rep. 638. And see In re Ohio Copper Mining Co. (D. C.) 237 Fed. 490, 38 Am. Bankr. Rep. 548.

[99] In re J. B. & J. M. Cornell Co. (D. C.) 186 Fed. 859, 26 Am. Bankr. Rep. 252. A sale through bankruptcy proceedings is a judicial sale, subject to the same rules as an auction; so that a bid may be withdrawn before the hammer falls. In re Glas-Shipt Dairy Co., 239 Fed. 122, 152 C. C. A. 164, 38 Am. Bankr. Rep. 554. But see In re Lane Lumber Co., 207 Fed. 762, 125 C. C. A. 300, 31 Am. Bankr. Rep. 148.

[100] Gray v. Veirs, 33 Md. 18.

[101] In re Chandler (C. C. A.) 194 Fed. 944, 28 Am. Bankr. Rep. 89. But see In re Williams, 197 Fed. 1, 116 C. C. A. 523, 28 Am. Bankr. Rep. 258.

[102] In re Ryan, 6 N. B. R. 235, Fed. Cas. No. 12,182; In re Knott, Fed. Cas. No. 7,893; Hawkins v. Alston, 4 Ired. Eq. (39 N. C.) 137.

§ 477. **Terms of Sale.**—There is nothing in the bankruptcy act which specifically forbids the sale of a bankrupt's property by the trustee on credit. And under the act of 1867, it was held that a sale so made was not necessarily invalid for that reason alone.[103] But a trustee who sells on any other terms than immediate cash takes a serious responsibility, and one which he should not assume without the express permission of the court or the consent of all the creditors. At least, it has been held that if the trustee, without the sanction of the court, sells the effects of the estate on credit, taking the purchasers' notes for the price, and then is so dilatory or negligent in his efforts to collect the notes that he suffers them to become outlawed, he is personally responsible for the loss, whether the makers of the notes were originally responsible or not.[104] It is also a requirement of the statute that "all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."[105] The appraisers should value the property at its fair market price, that is, the price which it might be expected to bring at a private sale in the ordinary course of business or in the ordinary methods of selling such property, and not at the price which it might be expected to bring at a forced sale. This is shown by the fact that the law does not require the property to bring its appraised value, but only provides that, if it is sold without the approval of the court, it must bring not less than three-fourths of that value.

§ 478. **Who may purchase.**—A referee in bankruptcy cannot, directly or indirectly, purchase any property of an estate in bankruptcy over which he has jurisdiction as a referee. This is expressly forbidden by the act, and moreover, it is made a criminal offense and conviction thereof vacates his office.[106] For similar reasons, one who has been employed in appraising the property cannot buy it, either directly or through the agency of an attorney.[107] Neither can the trustee himself

[103] Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467. Compare (as to sales by assignees for the benefit of creditors), Muller v. Norton, 132 U. S. 501, 10 Sup. Ct. 147, 33 L. Ed. 397; Schuler v. Israel, 27 Fed. 851; Meacham v. Sternes, 9 Paige (N. Y.) 398.

[104] In re Newcomb, 32 Fed. 826.

[105] Bankruptcy Act 1898, § 70b. And see supra, § 300. An appraisal made by persons appointed by the court will be presumed honest and accurate, and while the approval of the court is not necessary if the property is sold for as much as 75 per cent. of the appraised value, yet, if a less sum is bid, the court is bound to exercise its best discretion in the matter. In re American Beaver Co. (D. C.) 242 Fed. 599, 39 Am. Bankr. Rep. 603.

[106] Bankruptcy Act 1898, § 39b, par. 3; Id., § 29c, par. 2.

[107] In re Frazin & Oppenheim, 181 Fed. 307, 24 Am. Bankr. Rep. 598.

become the purchaser at his own sale. This is forbidden on principles of public policy.[108] Such a sale will be set aside; and though the trustee may not be required to lose the value of improvements made by him on the property after the sale, yet it is not enough to prevent a resale that he accounts for the value of the property at the time of the sale, if it largely appreciated thereafter.[109] Still, there may be exceptional circumstances in which it will be proper for the court to permit the trustee to become a bidder at his own sale. Thus in one case, where real estate came to the trustee incumbered with liens exceeding its value, the trustee himself being one of the judgment creditors, it was held competent for the court to grant him leave to proceed in a state court to sell the property on his judgment and to bid in his individual right at the sheriff's sale.[110] So a sale in bankruptcy is not voidable because one of the three trustees of the bankrupt was a stockholder and officer of a new corporation organized for the purpose of purchasing the bankrupt's property, when the creditors appointed him with full knowledge of this fact, and the new company was promoted by a reorganization committee of the bankrupt's creditors for the purchase of the property, and all the stockholders of the bankrupt corporation were given full opportunity to participate.[111] Where the subject of the sale was certain claims against the United States, and they were bought by a person who had formerly been the manager of the bankrupt corporation, and he had more knowledge of the merit of the claims and more confidence of ultimate success in collecting them than the creditors had, it was held that this did not require that the sale should be set aside, where there was no fraud or concealment, and the creditors had an opportunity to ascertain for themselves the situation in respect to the claims.[112] Where land of the bankrupt is sold subject to a mortgage, the mortgagee, not having proved his claim in the bankruptcy proceeding, may, like any other person, bid for the bankrupt's equity of redemption.[113] The wife of the bankrupt may become a purchaser at the sale, but she has the burden of showing that the purchase was not made with money furnished by the bankrupt.[114]

There is nothing to prevent the bankrupt himself from buying any portion of his former assets when offered for sale by his trustee, if he can pay the price either out of his exempt property or out of property acquired after the adjudication; and if he does so purchase, he will take

[108] Citizens' Bank v. Ober, 1 Woods, 80, 13 N. B. R. 328, Fed. Cas. No. 2,731.

[109] In re Hawley, 117 Fed. 364, 9 Am. Bankr. Rep. 61.

[110] In re Carrier, 39 Fed. 193.

[111] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92.

[112] Bray v. United States Fidelity & Guaranty Co. (C. C. A.) 267 Fed. 533, 45 Am. Bankr. Rep. 395.

[113] In re Old Oregon Mfg. Co. (D. C.) 236 Fed. 804, 38 Am. Bankr. Rep. 409.

[114] Woodford v. Rice (D. C.) 207 Fed. 473, 30 Am. Bankr. Rep. 455.

a new title, embracing all the interest which the trustee had to convey.[115] So he may make the purchase through an attorney.[116] And it does not invalidate the sale that the successful bid was made by an attorney employed by the purchaser for that purpose and that the attorney had acted as counsel for the bankrupt and also for the trustee in rendering certain legal services required locally, where he had no connection with the bankruptcy proceedings.[117] Any collusive or fraudulent combination among creditors or other bidders will of course be ground for setting aside the sale.[118] But when the property of a bankrupt corporation is for sale, it is perfectly proper for the bondholders, stockholders, or officers to form a syndicate or a reorganization committee or a new corporation, for the purpose of bidding on the property and acquiring it if they can fairly, and if they make no attempt to stifle or exclude independent competition.[119]

§ 479. Rights and Liabilities of Purchasers.—The powers of a trustee in bankruptcy are in no sense judicial, and his acts bind only those whom he represents. In the sale of the bankrupt's estate, he acts only for the creditors who prove their claims, and in such matters he can conclude the rights of no one else.[120] And a purchaser at a bankruptcy sale must take notice that nothing is sold except the bankrupt's interest.[121] Thus, where the trustee sells land, the title to which was acquired by the bankrupt after the filing of the petition in bankruptcy,

[115] Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Gates v. Fraser, 9 Ill. App. 624; Udall v. School District No. 4, 48 Vt. 588; Arnold v. Leonard, 12 Smedes & M. (Miss.) 258.

[116] Beall v. Chatham, 100 Tex. 371, 99 S. W. 1116.

[117] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92.

[118] In re Troy Woolen Co., 8 Blatchf. 465, 4 N. B. R. 629, Fed. Cas. No. 14,201.

[119] In re Pittsburgh Dick Creek Mining Co., 197 Fed. 106, 28 Am. Bankr. Rep. 613; In re Prudential Outfitting Co. (D. C.) 250 Fed. 504, 41 Am. Bankr. Rep. 621. Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. In the case last cited it was said: "That there should be a reorganization agreement for the purpose of buying in the property of the bankrupt corporation cannot be objected to. In fact it furnishes the only way that a large diversified property and plant like that of the S. Company can be sold and purchased without disastrous results to creditors and stockholders, and the creditors have every right to organize themselves for the purpose of protecting their interests. These are propositions that need neither argument nor authority to support. That the trustees should in good faith encourage and approve a plan which looked to the successful settlement and winding up of the bankruptcy estate, and which met with the approval of creditors and had the consent of all classes interested, was perfectly proper."

[120] Second Nat. Bank v. National State Bank of New Jersey, 10 Bush (Ky.) 367.

[121] Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 S. E. 887. And see Whitman v. Cammack, 7 Rob. (La.) 361; Shesler v. Patton, 114 App. Div. 846, 100 N. Y. Supp. 286. Where a bankrupt constructed an addition to a leased building on leased ground, the question whether such building constituted a fixture, or whether it was removable, as against the landlord, by a purchaser at a sale of the bankrupt's assets, could not be determined in advance of a sale and an attempt to sever. In re Gorwood, 138 Fed. 844, 15 Am. Bankr. Rep. 107.

the burden is on him and those who claim under him to show that the land equitably belonged to the bankrupt when the petition was filed.[122] Further, although a sale is ordered and confirmed by the court, this is not an adjudication that the property sold belonged to the estate of the bankrupt, but only that whatever title the bankrupt had to the property legally passed to the purchaser at the sale.[123] Further, it is a well-settled principle of law that there is no warranty in judicial sales and that the rule of caveat emptor applies to such sales with full force.[124] But a court of equity, in pursuance of justice, may set aside a sale made by a trustee in bankruptcy where it is shown that the purchaser has been innocently misled by the advertised notice of the sale.[125] But where the purchaser was expressly informed that the trustee was selling only such title as he possessed, and knew that such title was in litigation, and that the trustee assumed no personal responsibility and did not warrant the title or salability of the property, the purchaser cannot recover the money paid therefor, when it is subsequently determined that the trustee had no interest which he could convey.[126] In fact, it is the duty of an intending purchaser at such a sale to make an independent investigation of the nature and validity of the bankrupt's title, and to follow up all inquiries which are suggested by his discovery of doubtful or suspicious circumstances, otherwise he is in no position to ask aid or relief from the court.[127] But he is entitled to rely on an absolute compliance with the terms of the sale, and on the absolute fairness of an auction conducted under the order of the court.[128] He is not bound to see that every particular in the appointment and qualification of the trustee has been complied with.[129]

The purchaser becomes so far a party to the proceedings as to give the court of bankruptcy jurisdiction to make any and all orders necessary to compel him to complete his purchase.[130] And if he abandons his

[122] Wilkins v. Tourtellott, 28 Kan. 825.

[123] Chellis v. Coble, 37 Kan. 558, 15 Pac. 505. Where a bankrupt has no title to land, a sale thereof by the trustee conveys no title as against persons not parties to the bankruptcy proceeding. Anderson v. Daugherty, 169 Ky. 308, 183 S. W. 545.

[124] A person purchasing the bankrupt's assets from the trustee is charged with knowledge of any lack of authority on the part of the trustee, and also of the fact that the sale must be approved. In re Eden Musee American Co. (D. C.) 230 Fed. 925, 36 Am. Bankr. Rep. 111. Where the trustee sells property which never has been in his possession, the proceeds must stand for the benefit of one having a valid claim or lien upon it. Johnson v. American Smelting & Refining Co., 99 Neb. 633, 157 N. W. 337.

[125] Searcy v. McChord, 1 Fed. 261. And see In re Mott, 1 N. B. R. 223, Fed. Cas. No. 9,879; Carney v. Averill, 110 Me. 172, 85 Atl. 494.

[126] In re Frasin (C. C. A.) 201 Fed. 343, 29 Am. Bankr. Rep. 212; Taylor v Kimmerle, 232 Fed. 134, 146 C. C. A. 326, 37 Am. Bankr. Rep. 34.

[127] Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748.

[128] In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738.

[129] Zeigler v. Shomo, 78 Pa. St. 357.

[130] Where, after a sale in bankruptcy, but before its confirmation by the court,

purchase, without any attempt to secure the property (transferable only on certain conditions) he will be liable for the loss on a resale.[131] So long as the proceedings are pending in the court of bankruptcy, as, on application to have the sale confirmed, the property is still within the control of that court, and it may give the purchaser what aid he may need.[132] But when the sale has been made, the proceeds received by the trustee, and the sale ratified by the court, it has no further jurisdiction over the property, and cannot interfere, by injunction or otherwise, to protect the purchaser against the assertion of adverse claims. He is thereafter left to himself, and must protect his own interests in any appropriate court, but cannot treat the bankruptcy court as a general warrantor of title.[133] As stated in one of the cases: "The court does not follow the property of the estates of bankrupts into the hands of purchasers, but only to the hands of purchasers. After they have once had the property, they must take care of it and of the possession of it." [134]

Where the property sold is a chose in action, the purchaser may of course sue on it, and it is sufficient evidence of the authority of the trustee in bankruptcy that he acted as such, without record evidence thereof.[135] And where a debt due to the bankrupt from a third person is sold, it cannot be offset by a debt due from the bankrupt to such third person which was acquired after the bankruptcy.[136] Where an equity of redemption is sold and a valid conveyance made, the purchaser may maintain a suit to redeem.[137] The special short statute of limitations contained in the bankruptcy act does not apply to actions by purchasers to recover property or collect debts bought by them.[138]

the property is so seriously damaged by a flood as to become substantially worthless, the loss cannot be visited upon the purchaser; the court has a judicial discretion to exercise in the matter of confirming the sale, and it would be an abuse of such discretion to require the purchaser to bear the loss. In re Finks, 224 Fed. 92, 139 C. C. A. 648, 34 Am. Bankr. Rep. 749.

[131] Snyder v. Bougher, 214 Pa. St. 453, 63 Atl. 893; In re Myers-Wolf Mfg. Co. (C. C. A.) 205 Fed. 289, 30 Am. Bankr. Rep. 572.

[132] Potter v. Martin, 122 Mich. 542, 81 N. W. 424.

[133] Adams v. Crittenden, 17 Fed. 42; Briggs v. Stephens, 7 Law Rep. 281, Fed. Cas. No. 1,873; Henrie v. Henderson, 145 Fed. 316, 76 C. C. A. 196, 16 Am. Bankr. Rep. 617.

[134] In re Hale, 19 N. B. R. 330, Fed. Cas. No. 5,912. Assets of a bankrupt corporation having been sold to a reorganization committee, a court in a bankruptcy proceeding has no jurisdiction to control the rights to be given by such committee to stockholders of the old company in the reorganization. In re Witherbee, 202 Fed. 896, 30 Am. Bankr. Rep. 314.

[135] Arnold v. Leonard, 12 Smedes & M. (Miss.) 258. See Breakstone v. Buffalo Foundry & Machine Co., 79 Misc. Rep. 496, 141 N. Y. Supp. 159; Jennings v. Whitney, 224 Mass. 138, 112 N. E. 655.

[136] Judson v. Lathrop, 6 La. Ann. 587.

[137] Davis v. Ives, 75 Conn. 611, 54 Atl. 922. But the right of a mortgagor (under a state statute) to redeem within two years after a foreclosure does not pass to a purchaser from his trustee in bankruptcy. Leith v. Galloway Coal Co., 189 Ala. 204, 66 South. 149.

[138] Judson v. Lathrop, 6 La. Ann. 587.

§ 480. Nature and Extent of Title Conveyed.—A purchaser at a trustee's sale of the property of a bankrupt acquires no higher title or greater rights than the bankrupt himself had in the property sold.[139] Thus, a deed of land given on such a sale conveys only an interest in the surface of the land, when the bankrupt had previously conveyed by a recorded deed the coal and other minerals underlying it.[140] So, where the tenant of a building places fixtures therein, the purchaser of the same from his trustee in bankruptcy acquires only such right to remove the fixtures as the tenant may have had.[141] And one who buys land from a trustee in bankruptcy knowing that the bankrupt held the land in trust for another, though by a deed absolute in form, acquires no title on which he can maintain a writ of entry.[142] One who buys the bankrupt's interest in a contract for the conveyance of land to him has all the rights therein which the bankrupt would have had but for the bankruptcy.[143] And a sale by the trustee of land held in trust by the bankrupt to secure debts due to himself passes to the purchaser the debts secured as well as the legal estate in the land, and entitles him to possession until the debts are paid.[144] It is to be observed that the purchaser acquires whatever title the bankrupt had in the land at the time of the sale, and if the bankrupt acquired any better or different title from the time of the adjudication in bankruptcy to the time the sale was made, that title inures to the benefit of the purchaser.[145] But it is otherwise as to a title vesting in the bankrupt by devise after the sale.[146] It is also a general principle that a purchaser of property at a bankruptcy sale takes it subject to all the equities with which it was chargeable in the hands

[139] McKiernan v. Fletcher, 2 La. Ann. 438; Wallace v. Meeks, 99 Ark. 350, 138 S. W. 638; Watson v. Conrad, 38 W. Va. 536, 18 S. E. 744; Winter, Loeb & Co. v. Montgomery Cooperage Co., 169 Ala. 628, 53 South. 905; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; Converse v. Sorley, 39 Tex. 515; Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807; Osborn v. Mills, 20 Cal. App. 346, 128 Pac. 1009; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Bailey v. Anderson, 142 Ga. 11, 82 S. E. 290. The sale and conveyance by a trustee of a bankrupt, in which the only property described was real estate, does not pass title to a house standing on the property, which, to the knowledge of the purchaser, belonged to another person. Sacred Heart Roman Catholic Church v. Vedder, 80 Misc. Rep. 541, 142 N. Y. Supp. 870. One purchasing a note at a bankruptcy sale after its maturity acquires only such title or interest as the bankrupt had, and the maker has the right to the same defenses against the purchaser that he would have if the trustee in bankruptcy were the plaintiff. Phillips v. Matthews, 205 Ala. 480, 88 South. 641.

[140] Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216. And so also as to a mining lease. See Pittsburgh & West Virginia Gas Co. v. Ankrom, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157.

[141] Jacob v. Kellogg, 56 Misc. Rep. 661, 107 N. Y. Supp. 713. See Sacred Heart Roman Catholic Church v. Vedder, 80 Misc. Rep. 541, 142 N. Y. Supp. 870.

[142] Faxon v. Folvey, 110 Mass. 392.

[143] Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353.

[144] Green v. Green, 79 N. C. 343.

[145] McAlpine v. Tourtelotte, 24 Fed. 69.

[146] Wilson v. Dresser, 152 Ill. 387, 38 N. E. 888.

of the bankrupt.[147] And unless the court of bankruptcy orders the property sold free of incumbrances, the purchaser will take it subject to all valid and recorded liens, that is, he will take only the equity of redemption, and the holder of a mortgage or other lien may proceed to enforce it against such purchaser,[148] or, conversely, the purchaser will have the right to redeem from a mortgage or other lien or from a sale on foreclosure thereof.[149] But the purchaser will be protected against a prior unrecorded deed of the bankrupt if he has no notice of it and is not chargeable with knowledge of facts sufficient to put him on inquiry.[150] But an announcement made at the sale, concerning the existence of an unrecorded mortgage or deed, will charge the purchaser with notice.[151] And where the order of court directing the sale authorizes the trustee to sell only the right, title, and interest of the bankrupt in the property and to convey by a quitclaim deed, a purchaser who has actual notice of an agreement made by the bankrupt and binding him to pay certain royalties on mining operations conducted on the land to the former owner, the same constituting a covenant running with the land, will take subject to the same and not free from it.[152] But if a previous conveyance, transfer, or assignment of the property in question, made by the bankrupt, is voidable under the bankruptcy law as having been preferential or as made in fraud of creditors, the purchaser of the property at the trustee's sale of it will succeed to the trustee's right to vacate or annul such transfer or assignment, and may maintain an appropriate action to do so.[153]

[147] Renick v. Dawson, 55 Tex. 102; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Anderson v. Miller, 7 Smedes & M. (Miss.) 586; Steadman v. Taylor, 77 N. C. 134; Consolidated Arizona Smelting Co. v. Hinchman, 212 Fed. 813, 129 C. C. A. 267.

[148] In re Wylie, 153 Fed. 281, 82 C. C. A. 411, 18 Am. Bankr. Rep. 503; In re Allin, 12 Fed. 433; Bucknam v. Dunn, 2 Hask. 215, 16 N. B. R. 470, Fed. Cas. No. 2,096; In re Cooper, 16 N. B. R. 178, Fed. Cas. No. 3,190; Horkan v. Eason, 10 Ga. App. 236, 73 S. E. 352; Owen v. Potter, 115 Mich. 556, 73 N. W. 977; Moore v. First Nat. Bank, 135 Ark. 369, 205 S. W. 902; Collier v. Seward & Roper, 116 Va. 377, 82 S. E. 100; Crouch v. Fahl, 63 Ind. App. 257, 113 N. E. 1009. One buying property at a bankruptcy sale subject to a mortgage thereon does not assume payment of the mortgage debt, but becomes owner of the property subject to the incumbrance. Kerman v. Leeper, 172 Mo. App. 286, 157 S. W. 984.

[149] Greene v. Taylor, 132 U. S. 415, 10 Sup. Ct. 138, 33 L. Ed. 411.

[150] Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Holbrook v. Dickenson, 56 Ill. 497; Lynch v. Johnson, 170 N. C. 110, 86 S. E. 995.

[151] Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807.

[152] Hinchman v. Consolidated Arizona Smelting Co., 198 Fed. 907, 29 Am. Bankr. Rep. 893.

[153] In re Downing (C. C. A.) 201 Fed. 93, 29 Am. Bankr. Rep. 228; Bryan v. Madden, 79 App. Div. 636, 80 N. Y. Supp. 1131; s. c., 109 App. Div. 876, 90 N. Y. Supp. 465; Dwinel v. Perley, 32 Me. 197; Bartles v. Gibson, 17 Fed. 293; Hinton v. Williams, 170 N. C. 115, 86 S. E. 994; Finney v. Knapp Co., 145 Ga. 400, 89 S. E. 413. But see Annis v. Butterfield, 99 Me. 181, 58 Atl. 898; Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A.) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

Whatever title the purchaser takes, it is understood to be absolute and final, and not provisional or defeasible. The court has no power to deprive him of whatever rights he may acquire by his purchase, and therefore cannot grant leave to a creditor of the estate, or to any one else, to redeem from the sale on reimbursing the purchaser.[154] The latter will also be entitled to the rents and profits of real property purchased from the day of the sale, and not merely from the date of its confirmation.[155] But he cannot claim the bankrupt's right to any portion of the crops growing on the land and stipulated to be paid to him by way of rent.[156] Where the property sold consists of a going business, the purchaser will take it with the good will, if that was meant to be included in the sale,[157] and he may probably continue the business in the name of the former owner, a corporation,[158] or at least, he will have the right to advertise himself, by store signs or otherwise, as the "successor" of the bankrupt in the business.[159] Taxes due on the property at the time of the sale will of course be taken into account in fixing the price.[160] But taxes assessed after the sale, though before the payment of the balance of the purchase price and delivery of the deed must be paid by the purchaser, and he cannot claim reimbursement out of the funds of the estate, and this although the sale was made free of liens and incumbrances, since this applies only to such liens as existed at the date of the sale.[161]

[154] In re Novak, 111 Fed. 978, 7 Am. Bankr. Rep. 267.

[155] Hall v. Scovel, 10 N. B. R. 295, Fed. Cas. No. 5,945. As to application of rents on interest and principal of prior mortgage, see In re Ketterer Mfg. Co., 162 Fed. 583, 20 Am. Bankr. Rep. 694.

[156] In re Bledsoe, 12 N. B. R. 402, Fed. Cas. No. 1,533. A parol agreement to plant, cultivate, and care for an orchard on the land of another, and to divide the net proceeds after the trees have come to bearing age, is a mere license, and does not pass under a sale of the licensee's property in bankruptcy. McFerren v. Deardorff, 69 Pa. Super. Ct. 154.

[157] James Van Dyk Co. v. F. V. Reilly Co., 73 Misc. Rep. 87, 130 N. Y. Supp. 755. The sale by a corporation's trustee in bankruptcy of the assets and property of its business, without its good will and trade marks, destroys both the good will and trade marks as things of value, and will preclude the trustee from thereafter selling them as property of the bankrupt, and if he attempts to do so, he may be restrained. In re Jaysee Corset Co., 201 Fed. 779, 29 Am. Bankr. Rep. 856.

[158] S. F. Myers Co. v. Tuttle, 188 Fed. 532, 26 Am. Bankr. Rep. 541.

[159] Freeman v. Freeman, 86 App. Div. 110, 83 N. Y. Supp. 478. See Hotel Claridge Co. v. Gebrge Rector, Inc., 164 App. Div. 185, 149 N. Y. Supp. 748.

[160] As to trustee's sale of land free from lien of taxes, see supra, § 472. The liability of a purchaser of the bankrupt's real estate for taxes thereon, constituting a lien under the law of the state, depends on the terms of the sale. In re Reading Hat Mfg. Co. (D. C.) 224 Fed. 786, 34 Am. Bankr. Rep. 884. The purchaser at a bankruptcy sale of property on which a city had a lien for taxes takes it subject to the taxes, if the sale was not declared to be free of tax liens, and the city had no notice of the bankruptcy proceedings or that its claim was or would be adjudicated therein. Citizens' Savings Bank v. City of Paducah, 159 Ky. 583, 167 S. W. 870.

[161] In re Crowell (D. C.) 199 Fed. 659, 29 Am. Bankr. Rep. 308. And see In re Reading Hat Mfg. Co. (D. C.) 239 Fed. 357, 39 Am. Bankr. Rep. 207.

Where certain personal property was not inventoried as an asset of the bankrupt's estate in the possession of the trustee, or as property to which the trustee claimed title, and was not mentioned in the appraisal nor in any transfer from the trustee, the purchaser of the bankrupt's property from the trustee acquired no legal title to that particular property.[162]

§ 481. **Approval or Confirmation of Sale.**—The statute directs that "real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."[163] This is construed to mean that any sale for which it is practicable to obtain the approval of the court of bankruptcy must be approved or confirmed, and that the sale passes no title until approved or confirmed, either expressly or impliedly.[164] And if the matter is drawn in question, a purchaser under a trustee's sale which was not approved by the court has the burden of proving that it was impracticable to make the sale subject to such approval.[165] The authority of the court in this respect may be exercised by the referee.[166] And since only the "approval" of the court is spoken of, it is not necessary that there should be a formal order confirming the sale in so many words. Thus, where, after an alleged unauthorized sale of the bankrupt's assets, the trustee applied for an order directing that the proceeds be delivered to him, which was duly entered by the court, this was held to constitute an affirmance of the sale.[167] But where the trustee makes a sale under order of the court and reports it for confirmation, the general rules governing judicial sales apply, and the validity of the title acquired depends upon the validity of the order of confirmation.[168] The creditors of the estate are not entitled to notice of an application for the confirmation of a sale.[169] But they may, it appears, offer objections to its confirmation if they have any substantial reasons for so doing. An unsuccessful bid-

[162] Ellis v. Feeney & Sheehan Building Co., 187 App. Div. 481, 176 N. Y. Supp. 61. And see Union Trading Co. v. Drach, 58 Colo. 550, 146 Pac. 767.

[163] Bankruptcy Act 1898, § 70b. Under the act of 1867, some of the courts of bankruptcy made a practice of not having trustees' sales reported to them for confirmation. See In re Alden, 16 N. B. R. 39, Fed. Cas. No. 151; In re Donnell, Fed. Cas. No. 3,986a.

[164] In re Shea, 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207; Everett v. Selden & Wright, 127 La. 573, 53 South. 867. Compare James v. Koy (Tex. Civ. App.) 59 S. W. 295.

[165] Davis v. Ives, 75 Conn. 611, 54 Atl. 922.

[166] In re American Beaver Co. (D. C.) 142 Fed. 599, 39 Am. Bankr. Rep. 603; Davis v. Ives, 75 Conn. 611, 54 Atl. 922.

[167] Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709.

[168] J. M. West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648, 116 S. W. 652.

[169] In re Nevada-Utah Mines & Smelters Corp., 198 Fed. 497, 28 Am. Bankr. Rep. 409. Compare In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866.

der at the sale may object to confirmation, but not merely on the ground that he would have bid more if the property had been sold as a whole instead of separately. But the high bidder has a standing in court to urge the acceptance of his bid and the confirmation of the sale.[170] No case has been found in which the bankrupt himself was admitted to oppose the confirmation of a sale; but in one instance this right was given to the heirs of a deceased bankrupt (whose estate had proved to be solvent) on their objection that the land in question, which was in another state, had not been appraised, and was insufficiently advertised.[171]

As to the matters to be considered on such an application, the approval or disapproval of the sale rests very much in the discretion of the court,[172] and it may withhold its approval on account of mere inadequacy of price, without more;[173] it is not necessary that there should be fraud shown, or such gross inadequacy of price as to be proof of fraud.[174] Still it must be remembered that the purchaser at the sale has substantial rights, which are to receive the first consideration. The highest bidder at the sale, provided he is able and willing to comply with the terms of sale, is entitled to have his bid accepted and reported for confirmation, and to have the sale to him confirmed, if the sale was made on sufficient notice and for a fair price, and there appears to have been a compliance with all necessary and proper requirements for holding the sale, and honesty and fair dealing in the sale itself.[175] But the court may impose equitable terms or conditions upon the purchaser, as, for instance, by requiring him to give security for the payment of future rent on the sale of a leasehold interest.[176] An order of confirmation has

[170] Jacobsohn v. Larkey, 245 Fed. 538, 157 C. C. A. 650, L. R. A. 1918C, 176, 40 Am. Bankr. Rep. 563.

[171] In re Irvine (D. C.) 255 Fed. 168, 43 Am. Bankr. Rep. 155.

[172] In re Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54. Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88.

[173] See In re Ohio Copper Mining Co. (D. C.) 237 Fed. 490, 38 Am. Bankr. Rep. 548; Bryant v. Charles L. Stockhausen Co. (C. C. A.) 271 Fed. 921, 46 Am. Bankr. Rep. 414.

[174] In re Groves, 2 Nat. Bankr. News, 30; In re O'Fallon, 2 Dill. 548, Fed. Cas. No. 10,445. See In re Thompson, 1 Nat. Bankr. News, 355. The court, in deciding whether or not to confirm or approve a sale, where the only question is whether the price offered is the best that could be obtained, should consider what is for the benefit of the creditors in general, and may properly be influenced by their wishes, if a large majority concur in their views. See In re Peerless Finishing Co., 199 Fed. 350, 28 Am. Bankr. Rep. 429.

[175] In re Williams, 197 Fed. 1, 28 Am. Bankr. Rep. 258; In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856; In re Ewing, 16 Fed. 753; In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738. Where the high bid at a bankruptcy sale does not amount to 75 per cent. of the appraised value, the bidder does not acquire an equitable title to the property. In re American Beaver Co. (D. C.) 242 Fed. 599, 39 Am. Bankr. Rep. 603.

[176] In re Varley & Bauman Clothing Co., 188 Fed. 761, 26 Am. Bankr. Rep. 104. Where the referee, as part of a composition plan, sold property of a bankrupt, and confirmation of the sale was conditioned upon confirmation of the offer of composition by the court, the

the effect of a judgment and may raise an estoppel against parties whose rights were before the court,[177] but it is not a ratification of any act of the trustee done in excess of his authority, where it does not appear that the excess of power exercised was brought to the knowledge of the court.[178] The order of confirmation relates back to the date of the sale, so as to invest the purchaser with the character of an owner from the day of his purchase.[179]

§ 482. Payment or Recovery of Purchase Money.—The court of bankruptcy has jurisdiction and power to enforce in a summary manner the completion of the contract of sale, and to compel the purchaser to pay the stipulated price, which may also include interest if there has been unreasonable delay.[180] On the other hand, the purchaser may be entitled to a deduction or refund of part of the purchase money on account of a shortage in the quantity of the property sold.[181] And he may even be entitled to be excused from paying any part of the price, or to a restoration of what he may have paid, when it proves impossible for the trustee to make a title.[182] An order for a sale in bankruptcy may properly contain a provision that, in case of a purchase by a lien creditor, he may have credit on the price for such portion thereof as would otherwise accrue to him by reason of his lien.[183] And on the same principle, where property incumbered by a mortgage securing an issue of

sale is null and void, where the offer of composition is rejected. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670.

[177] Blood v. Munn, 155 Cal. 228, 100 Pac. 694.

[178] In re McGilton, 3 Biss. 144, 7 N. B. R. 294, Fed. Cas. No. 8,798.

[179] Lathrop v. Nelson, 4 Dill. 194, Fed. Cas. No. 8,111. A contract of sale made between the court as the vendor of property through the agency of a trustee, and the purchaser, is not regarded as consummated until it has received the sanction and ratification of the court. If the purchaser has not assumed the responsibility of protecting the property, by taking possession of it, any loss that may be sustained by its injury or deterioration, in the interval between the sale and final ratification, falls upon the vendor. Still it gives to the purchaser an inchoate and equitable title, which becomes complete by the ratification of the court. The ratification retroacts, and the purchaser is regarded, by relation, as the owner from the period of sale. He is entitled to the intermediate rents and profits; he cannot escape from the sale because disadvantageous; and he is bound to pay interest on the purchase money from its date. Wagner v. Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660. And see In re Finks, 224 Fed. 92, 139 C. C. A. 648, 34 Am. Bankr. Rep. 749.

[180] Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709; In re Myers-Wolf Mfg. Co., 205 Fed. 289, 123 C. C. A. 441, 30 Am. Bankr. Rep. 572.

[181] In re Drumgoole, 140 Fed. 208, 15 Am. Bankr. Rep. 261. See Owens v. Bruce, 109 Fed. 72, 48 C. C. A. 239, 6 Am. Bankr. Rep. 322. And see In re McCann (D. C.) 250 Fed. 1006, 42 Am. Bankr. Rep. 155.

[182] In re Caponigri, 210 Fed. 897, 127 C. C. A. 466, 32 Am. Bankr. Rep. 158. In re Miller (D. C.) 171 Fed. 263; In re Comer & Co. (D. C.) 171 Fed. 261.

[183] Clark Hardware Co. v. Sauve, 220 Fed. 102, 136 C. C. A. 194, 33 Am. Bankr. Rep. 674. And see Baker Motor Vehicle Co. v. Hunter, 238 Fed. 894, 152 C. C. A. 28, 39 Am. Bankr. Rep. 122.

bonds is sold in bankruptcy, the holders of bonds, if they become the purchasers, must be permitted to use their bonds in paying the purchase price.[184] But this does not apply where the bonds are void under the constitution of the state.[185] And the court will not ratify a sale where the bondholders of the bankrupt corporation, who do not include all of its creditors, propose to take over its property and assets, by transfer to a new corporation, and to pay the non-included creditors only a percentage of their claims or else give them obligations of the new corporation, for the court has no power thus arbitrarily to preclude the claims of the non-assenting creditors.[186]

§ 483. **Conveyance and Delivery.**—In the case of sales of real property of an estate in bankruptcy, the statute directs that the title "shall be conveyed to the purchaser by the trustee."[187] The deed should be made in exact accordance with the directions of the court, but an error in this respect will be cured by an order confirming the deed.[188] It should be executed by the trustee in his official capacity, as by describing himself as "trustee in bankruptcy,"[189] but need not contain a recital of the order of the court of bankruptcy authorizing the sale to be

[184] In re Fayetteville Wagon-Wood & Lumber Co., 197 Fed. 180, 28 Am. Bankr. Rep. 307; In re Saxton Furnace Co., 136 Fed. 697, 14 Am. Bankr. Rep. 483; In re Waterloo Organ Co., 118 Fed. 904, 9 Am. Bankr. Rep. 427; Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. In the case last cited it was said: "The proposition that the terms of sale were unequal and unfair, and competition was thereby stifled, is based upon the fact that the purchaser was permitted, by the terms of the order of sale, to turn in, in payment of the price, admitted securities [bonds of the bankrupt corporation], the argument being that the holders of securities could buy without paying cash, while an outsider would be compelled to pay cash. The contention in this case seems to disregard the general rule which prevails in all foreclosure and execution sales, wherein it is not deemed proper and necessary to require purchasers to put up cash with one hand to take it down with the other."

[185] In re Wyoming Valley Ice Co., 153 Fed. 787.

[186] In re J. B. & J. M. Cornell Co., 186 Fed. 859, 26 Am. Bankr. Rep. 252.

[187] Bankruptcy Act 1898, § 70c. Where there is a valid sale, under which the price has been paid, the mere failure to deliver a deed will not authorize a resale. In re King, 3 Fed. 839. Under the act of 1867, it was held that the cost of making and acknowledging the deed must be borne by the purchaser. In re Davenport, 3 N. B. R. 77, Fed. Cas. No. 3,587; In re Tulley, 3 N. B. R. 82, Fed. Cas. No. 14,235. The present statute, however, casts upon the trustee the duty of conveying the title, and would authorize the cost of a deed to be included in his account of expenses incurred in administering the estate. But undoubtedly it would be competent for the court (as is often done in foreclosure sales) to order that "conveyancing shall be at purchaser's cost."

[188] Harman v. Stearns, 95 Va. 58, 27 S. E. 601.

[189] Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864. An individual deed by a trustee in bankruptcy of property held in his official capacity, after the title had revested in the bankrupt, is ineffective for any purpose. Calligan v. Calligan, 259 Ill. 52, 102 N. E. 247. Where a deed by a trustee in bankruptcy is relied on in an action against strangers, preliminary proof of the trustee's title and his authority to make the sale is necessary. Brown v. White, 153 Ky. 452, 156 S.

private,[190] and will be sufficient to pass title although not sealed.[191] It should, however, be acknowledged before a competent officer,[192] and should contain a sufficient description of the property to identify it with reasonable certainty.[193] It should run to the purchaser at the sale, unless he directs it to be made out in the name of some other person,[194] and a state court has no jurisdiction to enjoin the execution of a deed to the purchaser, on a bill filed by one claiming to be jointly interested with him in the purchase of the property.[195] In the absence of specific covenants of title, they are not to be read into a trustee's deed by implication.[196] And the duty of the trustee to the purchaser ceases upon the delivery of a good and sufficient deed. Thus, a bankrupt in possession of realty at the time of its sale by his trustee, who thereafter agrees with the purchaser to vacate on a certain day, holds as a tenant under the purchaser, and a petition will not lie by the trustee in bankruptcy for delivery of possession.[197]

In case of the sale of personal property, the duty of the trustee is to deliver it to the purchaser. But it is said that his authority as trustee ceases when he has sold the property, and his subsequent failure to make delivery is a personal, and not an official, breach of duty.[198] On his refusal to deliver, the purchaser may maintain trover against him in a state court, to which action, however, an order of the court of bankruptcy setting aside the sale would be a complete defense.[199] In the case of intangible property or choses in action, delivery to the purchaser will include whatever is necessary to make his title clear and his ownership effective, as, for instance, a written assignment of a mortgage which was the subject of the sale.[200] But on the sale of a negotiable note by a trustee in bankruptcy, after its indorsement by the payee, or where it was payable to bearer, it is not necessary in order to pass title that the trustee should indorse the note, mere delivery being sufficient.[201] An assignment by a trustee in bankruptcy in pursuance of an order of sale of the bankrupt's bills receivable includes a debt due

W. 96. But see, as to aiding the trustee's deed by presumptions after a great lapse of time, Lacey v. Southern Mineral Land Co. (Ala.) 60 South. 283.

190 Ryder v. Rush, 102 Ill. 338.

191 Westfeldt v. Adams, 131 N. C. 379, 42 S. E. 823.

192 Harris v. Pratt, 87 Kan. 316, 15 Pac. 216.

193 James v. Koy (Tex. Civ. App.) 59 S. W. 295.

194 Wilson v. Winslow, 145 Mass. 339, 14 N. E. 103. And see Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88.

195 Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741.

196 Clark v. Post, 113 N. Y. 17, 20 N. E. 573.

197 In re Hale, 19 N. B. R. 330, Fed. Cas. No. 5,912.

198 Sheldon v. Rounds, 40 Mich. 425.

199 Ives v. Tregent, 29 Mich. 390, 14 N. B. R. 60.

200 In re Franklin Sav. Fund Soc., Fed. Cas. No. 5,059.

201 Wade v. Elliott, 11 Ga. App. 646, 75 S. E. 989; Arnold v. Leonard, 12 Smedes & M. (Miss.) 258.

to the bankrupt for goods sold, although the debt, without the knowledge of the trustee or the purchaser, had been previously reduced to judgment.[202]

§ 484. Application of Proceeds.—Out of the proceeds of a trustee's sale are to be paid first the costs and expenses of the sale,[203] and then any proper expenses incurred in caring for the property or putting it in condition to be sold, such as premiums for insurance,[204] and the value of improvements put upon the property by a purchaser at a former sale which was set aside.[205] Where the property is incumbered by a valid mortgage or other lien, it is wrong practice to charge the mortgagee with a proportionate part of the costs and expenses of the sale, but these should first be paid out of the proceeds, and then the mortgage creditor should be paid in full if the fund is sufficient for that purpose.[206] But the commissions of the trustee and referee do not outrank the mortgage debt, in case of a deficiency. That is, if the proceeds of sale are no more than sufficient to pay the mortgage, the holder of it is entitled to the full amount without deduction for such commissions, at least if there is any general fund of the estate against which they can be charged,[207] except, perhaps, in cases where the mortgagee himself petitioned for the sale or knew of it and made no objection.[208] But

[202] Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

[203] In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; Arnold v. Greene Gold-Silver Co., 68 Misc. Rep. 449, 125 N. Y. Supp. 29; In re Johnston, Fed. Cas. No. 7,424; In re Whitehead, 2 N. B. R. 599, Fed. Cas. No. 17,562; In re Johnson (D. C.) 224 Fed. 180. Counsel for the trustee may be allowed a fee as a charge against the fund arising from a sale of real estate in which both the bankrupt and the estate of an insolvent decedent held an interest, where his services were for the benefit of both classes of creditors. In re Tietje (D. C.) 263 Fed. 917, 44 Am. Bankr. Rep. 638.

[204] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675.

[205] In re William F. Fisher & Co., 148 Fed. 907, 17 Am. Bankr. Rep. 404.

[206] In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384; McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638. But see In re Howard, 207 Fed. 402. Only those fees, charges, and expenses necessary for the preservation of the property and the foreclosure of the lien may be charged against the fund realized from the sale, without the consent of a lienholder, of a bankrupt's property subject to the lien, the sale having been made free from liens. In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 35 Am. Bankr. Rep. 94.

[207] In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 24 Am. Bankr. Rep. 715; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Blue Ridge R. Co., 2 Hughes, 224, 13 N. B. R. 315, Fed. Cas. No. 1,570. The necessary expenses of the sale should be allowed, but not the expenses of administration in the bankruptcy court. The court cannot sell mortgaged premises free of the lien and use the proceeds in paying the expenses of administration, but may ascertain the amount actually due and make proper allowances for the expense of so doing. In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

[208] In re Torchia, 188 Fed. 207, 110 C. C. A. 248, 26 Am. Bankr. Rep. 579; In re Chambersburg Silk Mfg. Co., 190 Fed. 411, 26 Am. Bankr. Rep. 107.

where a first mortgage lien on the property is paid in full, not only the costs of sales but also commissions of officers may be satisfied out of the balance before any distribution to holders of valid but inferior liens, on the principle that the expenses of creating a fund are to be paid out of it.[209]

If the sale was made subject to incumbrances, the holder of a lien remains undisturbed in the possession of his security, but he cannot claim payment out of the proceeds of the sale.[210] On the other hand, if the sale was ordered to be made free of incumbrances, the liens of mortgagees and other secured creditors are transferred to the fund arising from the sale.[211] And this will apply to a creditor whose lien expired by limitation between the making of the order for sale and the actual sale; for a conversion will be regarded as having been made at the time of the order for the sale, and therefore whatever claim was a lien on the land when the order was made will be entitled to share in the proceeds.[212] A creditor whose lien is thus transferred is entitled to priority of payment out of the proceeds of the sale to the full amount of his debt.[213] And if the fund is sufficient for the purpose, he will also be entitled to interest on his claim up to the day of the sale,[214] and to reimbursement for money paid by him for insurance on the property, if that expenditure was authorized by the mortgage,[215] and a reasonable fee to his attorney for services rendered in connection with the sale and the distribution of the proceeds, but not necessarily the full ten per cent. stipulated for in the mortgage.[216] The order of liens is not displaced by a sale in bankruptcy, and if there are several liens on the property sold, they are transferred to the proceeds of the sale in the same relative rank and priority and are to be paid accordingly, so far as the fund will suffice.[217]

[209] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[210] In re Gerry, 112 Fed. 957, 7 Am. Bankr. Rep. 461.

[211] In re Randolph, 187 Fed. 186, 26 Am. Bankr. Rep. 623; McKay v. Hamill, 185 Fed. 11, 26 Am. Bankr. Rep. 164; Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, 22 Am. Bankr. Rep. 803; In re Vogt, 163 Fed. 551, 20 Am. Bankr. Rep. 457; In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. Bankr. Rep. 585; Crampton v. Massie, 236 Fed. 900, 150 C. C. A. 162.

[212] Davis v. Stitzer, 19 N. B. R. 61, Fed. Cas. No. 3,654.

[213] In re Lausman, 183 Fed. 647, 25 Am. Bankr. Rep. 186; In re Stevens, 173 Fed. 842, 23 Am. Bankr. Rep. 239; In re Oconee Milling Co., 109 Fed. 886, 48 C. C. A. 703; In re Mebane, 3 N. B. R. 347, Fed. Cas. No. 9,380.

[214] In re Stevens, 173 Fed. 842, 23 Am. Bankr. Rep. 239; In re Fabacher, 193 Fed. 556, 27 Am. Bankr. Rep. 534; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3,847; In re Hershberger (D. C.) 208 Fed. 94, 30 Am. Bankr. Rep. 635.

[215] In re Fabacher, 193 Fed. 556, 27 Am. Bankr. Rep. 534.

[216] In re Fabacher, 193 Fed. 556, 27 Am. Bankr. Rep. 534.

[217] In re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1,068; In re Worland, 92

Where claimants have liens on separate portions of the property, all of which is sold as a whole for a lump sum, it is the duty of the referee to apportion the proceeds among such claimants, and in so doing, if he has no other evidence on which to decide, he may properly fix the value of the various portions in accordance with the bids made previously for portions of the property when offered separately.[218] But where property is sold as an entirety and for a lump sum, only part of which is subject to a valid lien, and it would be impossible to determine with any accuracy how much of the price was given in consideration of the incumbered portion, there cannot be an apportionment of the gross price, so as to entitle the lien-holder to a preference to the extent of his claim, at least where he permitted the sale to be made in that manner and did not insist on a sale in portions.[219] But it seems that he may save his rights by a timely objection and by procuring a reservation of them in the order for sale, in which case it becomes the duty of the referee to recognize and enforce such rights, taking evidence, if necessary, to determine as nearly as possible what portion of the proceeds of the sale represented the property covered by the lien.[220] But all that has been said above applies only in the case of liens which are recognized as valid and binding by the laws of the state and are otherwise free from defect or infirmity. There can, for example, be no claim to priority of payment out of the proceeds of a bankruptcy sale in favor of one who asserts a vendor's lien on the property when the law of the state does not recognize any lien existing in an unpaid vendor apart from his legal estate in the land,[221] nor in favor of the holder of a mechanic's lien which is defective on its face,[222] or the holder of a mortgage on the bankrupt's liquor license, when the pledging of such property is discountenanced by the local law as contrary to public policy.[223]

Fed. 893, 1 Am. Bankr. Rep. 450. And see Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444; In re Cullen, 176 Fed. 463, 23 Am. Bankr. Rep. 793; In re Jamison Bros. & Co., 209 Fed. 541, 126 C. C. A. 363, 30 Am. Bankr. Rep. 972.

[218] In re Benz, 218 Fed. 50, 134 C. C. A. 26, 33 Am. Bankr. Rep. 363.

[219] Keyser v. Wessel, 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126; In re Smith, 123 Fed. 188, 10 Am. Bankr. Rep. 586; Vollmer v. McFadgen (C. C. A.) 161 Fed. 914, 20 Am. Bankr. Rep. 540; In re Gerry, 112 Fed. 957, 7 Am. Bankr. Rep. 461; In re Klapholz, 113 Fed. 1002, 7 Am. Bankr. Rep. 703. And see In re James Carothers & Co., 182 Fed. 501; First Savings & Banking Co., v. Kilmer (C. C. A.) 263 Fed. 497, 45 Am. Bankr. Rep. 366; In re B. A. Lockwood Grain Co. (D. C.) 225 Fed. 873, 35 Am. Bankr. Rep. 640.

[220] George Carroll & Bro. Co. v. Young, 119 Fed. 576, 56 C. C. A. 380, 9 Am. Bankr. Rep. 643.

[221] In re Clark, 118 Fed. 358, 9 Am. Bankr. Rep. 252. See In re Rector's, 220 Fed. 645, 136 C. C. A. 253.

[222] In re Miners' Brewing Co., 162 Fed. 327, 20 Am. Bankr. Rep. 717.

[223] In re McArdle, 126 Fed. 442, 11

The proceeds of a sale in bankruptcy are not to be charged with the costs and expenses of proceedings by creditors which were terminated or rendered nugatory by the bankruptcy proceedings. Thus, where a distress warrant had been issued but was stayed by bankruptcy proceedings against the tenant, and the goods were sold by the receiver in bankruptcy, it was held that the constable was not entitled to fees out of the proceeds as for a sale.[224]

If disputes arise among the claimants of the proceeds of sale, or as to the order of distribution, the court of bankruptcy (including the referee) has authority and jurisdiction to hear and determine the validity, extent, and relative priority of all claims,[225] but not to adjudicate upon the rights of one who claims an interest adverse to the bankrupt and who is a stranger to the proceedings.[226] If any balance remains, after paying the expenses and satisfying valid liens, the trustee will retain it as a part of the general funds of the estate for distribution to general creditors.[227]

§ 485. Vacating and Setting Aside Sale.—A state court has no jurisdiction, for any cause whatever, to interfere with or set aside a sale of a bankrupt's property by the trustee.[228] But the court of bankruptcy may vacate or annul such a sale, when sufficient reason is shown, and may proceed to do so in a summary manner, unless rights of third persons have intervened,[229] in which case the remedy must be sought in a plenary action against the purchaser and others concerned.[230] And it is no obstacle that the sale has been consummated by the delivery of a deed to the purchaser. If such deed was executed by the trustee improvidently, irregularly, or without due authority, or was procured by imposition or fraud practiced upon the court, or if it was designedly so drawn as to grant more than the order of the court warranted or to vary from it in material particulars, and if the title is still in the purchaser at the sale, who is chargeable with notice of the fraud or irregularity, the court has jurisdiction to vacate the sale and order the deed to be sur-

Am. Bankr. Rep. 358. See In re Fisher, 98 Fed. 89, 3 Am. Bankr. Rep. 406.

[224] In re Hageman (D. C.) 218 Fed. 708.

[225] In re Miners' Brewing Co. (D. C.) 162 Fed. 327, 20 Am. Bankr. Rep. 717; Leech v. Kay (C. C.) 4 Fed. 72; Globe Bank & Trust Co. v. Martin, 236 U. S. 289, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162; In re Bradley (D. C.) 263 Fed. 446, 45 Am. Bankr. Rep. 30; Durand v. Brown, 236 Fed. 609, 149 C. C. A. 605; Danville Ben. & Bldg. Ass'n v. Huff (C. C. A.) 262 Fed. 403, 45 Am. Bankr. Rep. 124; In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154.

[226] In re Muhlhauser, 121 Fed. 669, 57 C. C. A. 423, 10 Am. Bankr. Rep. 236.

[227] In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384.

[228] Akins v. Stradley, 51 Iowa, 414, 1 N. W. 609.

[229] In re Mott, Fed. Cas. No. 9,878.

[230] In re Charles Knosher & Co., 197 Fed. 136, 28 Am. Bankr. Rep. 747; In re Herdic, 40 Fed. 360.

rendered and canceled.[231] And even the intervening rights of a third person who has bought the property, or a part of it, from the original purchaser may not be sufficient to prevent the setting aside of a fraudulent or irregular sale, where the circumstances indicate knowledge or complicity on the part of such third person, or, assuming his innocence, it is possible to restore him to his original situation.[232]

But it is not consistent with the effective administration of the bankruptcy law that trustees' sales should be constantly overhauled for trivial causes. On the contrary, such sales should not be set aside except for cause sufficient to move the conscience of the court,[233] or where, as stated in one of the cases, "it would be a gross discredit to the administration of justice if the sale should be permitted to stand." [234] But it is essential that the sale should be fair and open, and any manipulation of it which tends to prevent the attendance of bidders, or to stifle competition among them, will be sufficient ground for vacating it.[235] Inadequacy of price will also be ground for setting aside a sale in bankruptcy, but only in case it is unconscionable or so gross as fairly to raise a presumption of fraud.[236] No general rule can be formulated on this point. But it is said that the appraisal fixes the value of the bankrupt's property, in the absence of reliable evidence impeaching it, and a sale for more than the appraised value, confirmed by the court, will not be set aside by an ap-

[231] In re Hyde, 19 Blatchf. 115, 6 Fed. 587; In re King, 3 Fed. 839; In re Stevenson, 6 Fed. 710. On the trustee's bill filed for this purpose, there must be a tender to the purchaser of the sum he bid at the sale. Lanham v. State Bank of Rome (C. C. A.) 268 Fed. 458, 46 Am. Bankr. Rep. 55.

[232] In re Frazin & Oppenheim, 181 Fed. 307, 24 Am. Bankr. Rep. 598; In re Finlay, 104 Fed. 675, 4 Am. Bankr. Rep. 745; In re Stevenson, 6 Fed. 710.

[233] In re Metallic Specialty Mfg. Co., 193 Fed. 300, 27 Am. Bankr. Rep. 408; Bray v. U. S. Fidelity & Guaranty Co. (C. C. A.) 267 Fed. 533, 45 Am. Bankr. Rep. 395.

[234] In re Troy Woolen Co., 8 Blatchf. 465, 4 N. B. R. 629, Fed. Cas. No. 14,201.

[235] In re Shea, 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207; In re Ethier, 118 Fed. 107, 9 Am. Bankr. Rep. 160. But see In re Pittsburgh Dick Creek Mining Co., 197 Fed. 106, 28 Am. Bankr. Rep. 613, where it was held that a sale otherwise satisfactory will not be set aside at the instance of a creditor who alleges that there was a conspiracy to keep him away from the sale and otherwise to defraud him of his just rights, since, if such was really the case, he has a remedy at law for damages. And see In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738. An agreement between two creditors to bid against each other at a bankruptcy sale, until a certain figure was reached, in order to induce other bids, and if no higher bids were received to buy the property for their joint account and divide the profits, is not invalid. Schaap v. Robinson, 133 Ark. 113, 201 S. W. 292. The fact that the only other bidder at a bankruptcy sale was a puffer employed to run up bids is not ground for releasing the successful bidder, if there was no assurance to the puffer or belief that he would not be held liable. Williams v. Hogue, 219 Fed. 182, 134 C. C. A. 556, 34 Am. Bankr. Rep. 40.

[236] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Burr Mfg. & Supply Co., 217 Fed. 16, 133 C. C. A. 126; In re Metallic Specialty Mfg. Co., 193 Fed. 300, 27 Am. Bankr. Rep. 408; In re Shapiro, 154 Fed. 673, 19 Am. Bankr. Rep. 125; In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856; In re Bousfield, 16 N. B. R. 481, Fed. Cas. No.

pellate court on the ground of inadequacy of price.[237] And the mere fact that the property has increased in value since the sale, or that it is discovered to possess a value which was not then suspected, will not warrant annulling the sale,[238] nor will the naked fact that a third person offers to pay a better price than that realized at the sale.[239] But an offer of an advanced price, made by a genuine and responsible bidder, is strong evidence that the price given at the sale was inadequate, and if the court is in this way satisfied that there was a gross discrepancy between the actual value of the property and the price obtained, it may properly vacate the sale and order a resale.[240] But the advance offered must be substantial, not a mere trifle,[241] and the intending purchaser may be required to enter into an agreement with the court (or even to give security) that he will attend the resale and bid at least as much as he has offered.[242]

Applications to vacate such sales are generally made by the creditors of the estate.[243] But they must be reasonably prompt and vigilant, in

1,702. And see Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803, where the following instructive remarks were made by Mr. Justice Brewer: "Something may be said on each side of the question; on the one, that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that, to the extent of that value, the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bidding in good faith at an open and public sale to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid, or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that if the creditors make no effort and are willing to take the chances of a general attendance, they have no right to complain on the ground that the property did not bring what it should have brought. In England, the old rule was that in chancery sales, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price 10 per cent; but this rule has been rejected, and now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness. But if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. Graffam v. Burgess, 117 U. S. 191, 6 Sup. Ct. 686, 29 L. Ed. 839. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts."

[237] Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184.

[238] Tyson v. Mickle, 2 Gill (Md.) 376; Phelps v. McDonald, 2 MacArthur (D. C.) 375, 16 N. B. R. 217.

[239] In re Ethier, 118 Fed. 107, 9 Am. Bankr. Rep. 160; In re Belden, 120 Fed. 524, 9 Am. Bankr. Rep. 679; Jacobsohn v. Larkey, 245 Fed. 538, 157 C. C. A. 650, L. R. A. 1918C, 1176, 40 Am. Bankr. Rep. 563; Day v. Luna Park Co., 174 Ill. App. 477.

[240] In re Palmer, 13 Fed. 870; In re Collins, 8 Ben. 328, Fed. Cas. No. 3,005.

[241] Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

[242] In re Shea, 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207.

[243] In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 33 Am. Bankr. Rep. 618; In re Prudential Outfitting Co.

order to entitle their petition to favorable consideration, and a creditor who, with full knowledge of the circumstances of a sale, accepts a dividend from the proceeds, and silently allows the purchaser to sell the property, cannot avoid the sale even for fraud and collusion.[244] Nor will this action be taken at the instance of one who is an entire stranger to the proceedings and whose rights, if any, in the property could not be prejudiced by the sale.[245] The special short statute of limitations contained in the bankruptcy act does not apply to proceedings to vacate a sale.[246] And when an order to this effect is made, based on causes for which the purchaser was not in any way responsible, he will be entitled to have his money refunded and also such expenses as he has reasonably and properly incurred in the preservation of the property.[247]

§ 486. **Collateral Impeachment of Sale.**—The validity of a trustee's sale in bankruptcy is not open to inquiry or impeachment in any collateral proceeding, either in a state or federal court,[248] more especially after the lapse of a considerable period of time, during which all parties in interest have acquiesced in the sale,[249] or where the attack upon the sale is based on mere irregularities.[250] But where a bankrupt's liquor license was sold subject to the condition that its transfer to the purchaser must be authorized by the local court having jurisdiction, an inquiry by the court of bankruptcy to ascertain the grounds on which the local court refused to approve the transfer, is not a collateral attack on its order.[251]

(D. C.) 250 Fed. 504, 41 Am. Bankr. Rep. 621.

[244] Hills v. Alden, 2 Hask. 299, Fed. Cas. No. 6,507.

[245] In re Muhlhauser, 121 Fed. 669, 57 C. C. A. 423, 10 Am. Bankr. Rep. 236. A stockholder of a bankrupt corporation, as such, has no standing in the bankruptcy case to require the trustee to answer his petition to set aside a sale of the bankrupt's assets to a reorganization committee. In re Witherbee (C. C. A.) 202 Fed. 896, 30 Am. Bankr. Rep. 314.

[246] Clark v. Clark, 17 How. 315, 15 L. Ed. 77.

[247] In re Troy Woolen Co., 8 Blatchf. 465, 4 N. B. R. 629, Fed. Cas. No. 14,201.

[248] Buckler's Adm'r v. Rogers, 54 S. W. 848, 21 Ky. Law Rep. 1265; Trumbo v. Fulk, 103 Va. 73, 48 S. E. 525; Keller v. Faickney, 42 Tex. Civ. App. 483, 94 S. W. 103; Chilton v. Metcalf, 234 Mo. 27, 136 S. W. 701; Mims v. Swartz, 37 Tex. 13; Steele v. Moody, 53 Ala. 418, 16 N. B. R. 558; Equitable Trust Co. v. Vanderbilt Realty Improvement Co., 155 App. Div. 723, 140 N. Y. Supp. 1008; Thompson v. Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89; Trabue v. Ash (Tex. Civ. App.) 200 S. W. 415.

[249] Buckler's Adm'r v. Rogers, 54 S. W. 848, 21 Ky. Law Rep. 1265.

[250] Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611; James v. Koy (Tex. Civ. App.) 59 S. W. 295; Herbst v. Bates, 13 Wkly. Law Bul. (Ohio) 565; Smith v. Long, 9 Daly (N. Y.) 429.

[251] In re Miller, 171 Fed. 263, 22 Am. Bankr. Rep. 560.

CHAPTER XXV

PROVABLE DEBTS AND CLAIMS

§ 487. Statutory Provisions.—The varieties of debts and claims which are provable in a bankruptcy proceeding are arranged by the statute in five groups or classes, as follows:

1. A fixed liability, evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition, whether then payable or not, with any interest which would have been recoverable at that date, or with a rebate of interest on such claims as were not then payable and did not bear interest.

2. Claims due as costs taxable against an involuntary bankrupt who

was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.

3. Claims founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt.

4. Claims founded upon an open account, or upon a contract express or implied.

5. Claims founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

To this it is added that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."[1]

These several subdivisions of the section are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims independently of the others; and hence the provision of the first clause, limiting the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the filing of the petition, does not impose the same limitation upon claims which fall within the other classes.[2] In general, it is said, this whole section of the statute should be so construed as to make all debts fairly within its meaning provable debts, in order to effectuate the purpose of the act in relieving insolvent debtors, and any doubt whether a debt is provable, or whether it is an unliquidated demand which may be made provable, should be resolved in favor of its provability.[3] In particular, it may be remarked that the fourth clause, which allows proof of debts founded upon a "contract express or implied," may be given a construction sufficiently broad to include quasi contracts arising upon a conversion of property where the tort has been waived.[4]

§ 488. Who Are Creditors Within the Act.—A creditor is defined by the act as "anyone who owns a demand or claim provable in bankruptcy." This includes the United States as well as any state or municipal corporation.[5] Foreign creditors, as well as domestic, are also en-

[1] Bankruptcy Act 1898, § 63.

[2] In re Smith, 146 Fed. 923, 17 Am. Bankr. Rep. 112.

[3] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

[4] Reynolds v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 26 Am. Bankr. Rep. 698.

[5] Bankruptcy Act 1898, § 57j. And see In re Mansfield, 6 N. B. R. 388, Fed. Cas.

titled to prove their claims and share in the estate.[6] Secured creditors may prove their demands as secured, and receive dividends on so much of the claim as remains unsatisfied after liquidating and applying the security or realizing on it, or they may waive the security and prove their debts as unsecured.[7] A preferred creditor may prove his claim if he will surrender his preference.[8] Also the claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee, and will be allowed in the same manner and upon like terms as the claims of other creditors.[9] And a court of bankruptcy may permit the bankrupt himself, acting in a representative capacity as the administrator of an estate, to prove an equitable debt, arising from a loan of funds borrowed from the estate of his intestate, whether such loan was lawful or not.[10] In proper cases, one to whom the bankrupt had previously made a general assignment for the benefit of his creditors may be permitted to prove a claim,[11] as also a surety for the bankrupt,[12] or a committee representing the bondholders of a bankrupt corporation.[13] The peculiar questions arising out of the bankruptcy of a partnership, and concerning the provability of claims of the partners as against each other and against the firm, have been considered in another place.[14] A corporation may of course be a creditor and prove a claim in bankruptcy; but ordinarily claims are not provable as between two corporations, one of which is merely an agency, branch, or reorganization of the other.[15]

But, to constitute a "creditor," it is always essential that there should be a debt measurable and payable in money, or a claim which is capable of being reduced to this kind of certainty, and also that it should be supported by a consideration or by a clear right of action. This excludes mere accommodation paper not based on any actual consideration,[16] and also the case of one who has dealt with a bankrupt corporation, but has

No. 9,049; In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592. As to proof of claim by a municipal corporation or by its treasurer, see Greil v. Durr, 203 Ala. 644, 84 South. 743.

[6] See Bankruptcy Act 1898, § 65d.

[7] See infra, §§ 561–563.

[8] See infra, §§ 604–607. And see In re Franklin Brewing Co. (D. C.) 265 Fed. 301, 45 Am. Bankr. Rep. 719; In re Dix (D. C.) 267 Fed. 1016, 46 Am. Bankr. Rep. 199.

[9] Bankruptcy Act 1898, § 57m.

[10] Warner v. Spooner, 3 Fed. 890.

[11] In re Rudd, 180 Fed. 312, 25 Am. Bankr. Rep. 35.

[12] Sessler v. Paducah Distilleries Co. (C. C. A.) 168 Fed. 44, 21 Am. Bankr. Rep. 723.

[13] In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769.

[14] See supra, § 130. And see In re Hirth, 189 Fed. 926, 26 Am. Bankr. Rep. 666; In re Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63; In re Savage, 16 N. B. R. 368, Fed. Cas. No. 12,381.

[15] See Clere Clothing Co. v. Union Trust & Savings Bank, 224 Fed. 363, 140 C. C. A. 49, 35 Am. Bankr. Rep. 419; In re Georgia Steel Co. (D. C.) 240 Fed. 473, 39 Am. Bankr. Rep. 426; Carroll v. Stern, 223 Fed. 723, 139 C. C. A. 253, 34 Am. Bankr. Rep. 570.

[16] Merchants' & Manufacturers' Nat. Bank of Columbus, Ohio, v. Galbraith, 157 Fed. 208, 84 C. C. A. 656, 19 Am. Bankr. Rep. 319.

agreed to accept shares of its stock in satisfaction of his claim.[17] Again, it is necessary that the consideration should have proceeded from the claimant himself or from some one to whose rights he has succeeded by a clear title.[18] Thus a claim cannot be allowed where it is shown that the money in question was not advanced by the claimant personally, but by a corporation in which he is a stockholder.[19] And further it is necessary to show that the bankrupt received or benefited by the consideration on which the claim is founded. But it is no objection to the allowance of a claim against a bankrupt corporation for money lent that it passed through several hands, where the claimant furnished the money with the intention that it should be a loan to the corporation, and the latter received it and used it as such.[20] And where a new company is organized to take over and carry on the business of a failing corporation, which afterwards becomes bankrupt, one who, being a director in both the old and the new company, takes an active part in organizing the new concern, and subscribes and pays for some of its stock in cash, may be considered as a creditor of the bankrupt corporation to that extent.[21] Nor can a creditor who lent money to the bankrupt be debarred from proving his claim by the fact that he himself borrowed the money from a bank, pledging as collateral the note and security given him by the bankrupt.[22] But one who sells property on credit to a third person, who turns it over to a corporation which does not become a party to the contract of sale, does not thereby become a creditor of the corporation so as to be entitled to prove a claim against its estate in bankruptcy.[23] The rule that one may take advantage of a contract to which he was not a party, but which was made for his benefit between two other persons, is also effective in bankruptcy, but his assent to the agreement must have been made effective before the bankruptcy of the promisor.[24] It is also

[17] Where a bank furnished money or credit with which certain imported wool was purchased in a foreign country, taking bills of lading and trust receipts in its own name, and, when the wool was sold by the importer, became the owner of the account, it alone was entitled to prove the claim against the estate of the purchaser in bankruptcy. Assets Realization Co. v. Sovereign Bank of Canada, 210 Fed. 156, 126 C. C. A. 662.

[18] In re Le Sueur County Co-operative Co., 195 Fed. 926, 27 Am. Bankr. Rep. 882.

[19] In re Watkinson, 143 Fed. 602, 16 Am. Bankr. Rep. 245.

[20] In re American Specialty Co. (C. C. A.) 191 Fed. 807, 27 Am. Bankr. Rep. 463. But one furnishing materials to a subcontractor of a general contractor of the United States, who gave bond in conformity with the act of Congress of Feb. 24, 1905, will be required to pursue the remedy prescribed by that act, and cannot prove a claim under the bankruptcy law against the estate of the bankrupt contractor. In re Hawley, 194 Fed. 751, 28 Am. Bankr. Rep. 58.

[21] In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. Rep. 511.

[22] Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40.

[23] In re Builders' Lumber Co., 148 Fed. 244, 17 Am. Bankr. Rep. 449.

[24] Blake v. Atlantic Nat. Bank, 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874.

a rule that a creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate so long as his own debt remains unpaid.[25] But on the other hand, where the father of a bankrupt, to whom the bankrupt was indebted, died after his adjudication, the right of the executor to prove the full indebtedness against the estate in bankruptcy is not affected by the fact that the father, by his will, left the bankrupt a share of his estate, from which any indebtedness due from the bankrupt was directed to be deducted.[26]

§ 489. **Estoppel to Prove Claim.**—The ordinary principles of estoppel may apply to a creditor seeking to prove a claim in bankruptcy,[27] and also the rule that a creditor having his choice between two inconsistent remedies must make his election, and cannot pursue both,[28] and the rule that one cannot rescind a contract and recover the original consideration, and at the same time prove a claim upon the contract itself.[29] But a creditor of a bankrupt who, after the bankruptcy, has taken a new promise based on the original debt, is not thereby precluded from maintaining his proof against the estate in bankruptcy and receiving dividends thereon, and at the same time proceeding against the bankrupt on the new obligation, so long as he receives but a single satisfaction of his debt.[30] And the fact that a creditor, prior to the bankruptcy, had begun a suit to set aside a deed as fraudulent does not estop him, on the deter-

[25] In re Gerson, 105 Fed. 893, 5 Am. Bankr. Rep. 850; In re Wiener & Goodman Shoe Co., 96 Fed. 949, 3 Am. Bankr. Rep. 200. On the same principle, a creditor of a bankrupt corporation, who, as a holder of its capital stock, is liable on calls or assessments, cannot participate in the assets of the estate until he has paid or satisfied such assessments. In re Manufacturers' Box & Lumber Co. (D. C.) 251 Fed. 957, 41 Am. Bankr. Rep. 763; In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93. See Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658, 40 Am. Bankr. Rep. 311.

[26] In re Woods (D. C.) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

[27] Sledge v. Denton (Tex. Civ. App.) 147 S. W. 281. Carroll v. Stern, 223 Fed. 723, 139 C. C. A. 253, 34 Am. Bankr. Rep. 570.

[28] Du Vivier & Co. v. Gallice (C. C. A.) 149 Fed. 118, 17 Am. Bankr. Rep. 557. And see In re W. A. Silvernail Co. (D. C.) 218 Fed. 977, 33 Am. Bankr. Rep. 57.

[29] In re Kenyon, 156 Fed. 863, 19 Am. Bankr. Rep. 194; Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475, 20 Am. Bankr. Rep. 335. And see In re Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715; In re Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69. But where, prior to the bankruptcy, a claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which he was unsuccessful, it was held that he was entitled to file against the bankrupt's estate for his whole claim. In re Venstrom, 205 Fed. 325, 30 Am. Bankr. Rep. 569. And see Boden & Haac v. Lovell, 203 Fed. 234, 30 Am. Bankr. Rep. 353, where certain foreign attachment litigation was held unavailable to sustain an estoppel preventing claimants from asserting claims not involved in such litigation against the bankrupt. Under a lease of machinery providing for redelivery at B., and the payment of certain charges, the lessor's acceptance of the machinery at a different place was held not a release of such charges. In re Desnoyers Shoe Co., 227 Fed. 401, 142 C. C. A. 97, 36 Am. Bankr. Rep. 51.

[30] In re Sweetser, 128 Fed. 165, affirmed Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437.

mination of the suit against him, from claiming the benefit of a lien reserved by such deed for his benefit.[31] So where the bankrupt commenced a suit before his bankruptcy, which was tried after the adjudication, and the defendant in that action set up in defense a particular claim as a distinct cause of action, but offered no evidence in support of it, and judgment went in favor of the bankrupt, this does not estop such defendant from proving his claim in the bankruptcy proceedings.[32] And though one named as assignee in a general assignment for the benefit of creditors, which is voided by the bankruptcy of the assignor, has accepted the trust, this does not preclude him from proving a bona fide debt which he has against the bankrupt.[33] So a mere covenant by a creditor not to sue an accommodation acceptor does not prevent such creditor from proving against the drawer's estate in bankruptcy.[34] Again, where the president of a bankrupt corporation had loaned money to it on notes, he is not estopped to claim the allowance thereof against the corporation's estate in bankruptcy because of statements of assets and liabilities made at various times, which did not include the notes, in the absence of any evidence that he had knowledge of their contents, or that credit was extended to the corporation, and the position of creditors changed, on the faith thereof.[35] So, although the bankrupt's bookkeeper prepared a financial statement which was submitted to a bank as a basis for credit, and the statement did not show that the bankrupt was indebted to the bookkeeper for his salary, this does not estop the latter to file a claim for unpaid salary, in the absence of evidence that credit was extended on the faith of the statement.[36] But on the other hand, where one advanced a large sum of money to a corporation on an agreement that he should receive stock in exchange for it when the capital stock of the company should be increased, and in the mean time that he should receive interest and also dividends, and this advance was represented to creditors as an increase of capital, and the lender held himself out as being connected with the business, and the corporation became bankrupt, it was held that the lender was estopped, as to creditors who had relied on the representations, to claim that he was a creditor and not a stockholder.[37] So, where

[31] Maxwell v. McDaniels (C. C. A.) 195 Fed. 426, 27 Am. Bankr. Rep. 692.

[32] In re People's Safe Deposit & Sav. Inst., 10 Ben. 38, 18 N. B. R. 493, Fed. Cas. No. 10,971.

[33] In re Horton, 5 Ben. 562, Fed. Cas. No. 6,707.

[34] Downing v. Traders' Bank, 2 Dill. 136, 11 N. B. R. 371, Fed. Cas. No. 4,046.

[35] Spencer v. Lowe (C. C. A.) 198 Fed. 961, 29 Am. Bankr. Rep. 876. So, the president of a bankrupt corporation, who had advanced money in connection with a composition in a former proceeding, was held not estopped from proving his claim because of representations that the money would be raised outside the assets of the corporation. McKey v. Bruns, 243 Fed. 370, 156 C. C. A. 150, 40 Am. Bankr. Rep. 189.

[36] In re Cox (D. C.) 199 Fed. 952, 29 Am. Bankr. Rep. 456.

[37] In re Desnoyers Shoe Co. (D. C.) 210 Fed. 533, 32 Am. Bankr. Rep. 51.

the only claim filed by a brother of the bankrupt against his estate was based on notes and a mortgage which were clearly fraudulent, he was held bound by such action, and not permitted to prove the claim as one for wages of labor and so entitled to priority.[38]

§ 490. **Fraudulent Conduct Barring Proof of Claim.**—Where a creditor of a bankrupt actively participates or assists him in the execution of a scheme to delay or defraud his other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and the court of bankruptcy will not aid the conspirators by allowing claims for such advances or expenses against the estate.[39] So also, where money is loaned or advances made for the purpose of establishing a fictitious credit for the bankrupt and so enabling him to cheat others.[40] And so where a creditor has attempted to gain an advantage over other creditors by including in his proof fictitious items or exaggerated amounts, or by including fraudulent or illegal and non-provable claims, his proof will not be allowed even to the extent of an honest debt which may be included in it, but will be rejected as an entirety.[41] And the same rule has been applied where a creditor holding collateral security under a pledge, took the opportunity, as soon as a petition in bankruptcy had been filed, to sell the security to himself at a pretended auction at a small fraction of its face value, and without notice to any party in interest.[42] But there is nothing illegal in endeavoring to buy up all the claims against the estate of a bankrupt, for the purpose of staying the bankruptcy proceedings altogether; and if the purchaser fails in this, he should nevertheless be allowed to prove such claims as he has acquired as though he were an original creditor.[43] And

[38] In re Hemstreet, 139 Fed. 958, 14 Am. Bankr. Rep. 823.

[39] Butcher v. Werksman, 204 Fed. 330, 30 Am. Bankr. Rep. 332; In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re L. M. Alleman Hardware Co., 172 Fed. 611, 22 Am. Bankr. Rep. 871; In re Lansaw, 118 Fed. 365, 9 Am. Bankr. Rep. 167; In re Knox, 98 Fed. 585, 3 Am. Bankr. Rep. 371; In re Hugill, 100 Fed. 616, 3 Am. Bankr. Rep. 686; In re Hatje, 6 Biss. 436, 12 N. B. R. 548, Fed. Cas. No. 6,215. But see In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769. And compare In re L. M. Alleman Hardware Co. (C. C. A.) 181 Fed. 810, 25 Am. Bankr. Rep. 331.

[40] In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Royce Dry Goods Co., 133 Fed. 100, 13 Am. Bankr. Rep. 257.

[41] In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326; Marzett v. Atterbury, 3 Dill. 444, 11 N. B. R. 225, Fed. Cas. No. 9,102.

[42] In re Mertens, 134 Fed. 101, 14 Am. Bankr. Rep. 226. But see Turner v. Metropolitan Trust Co. (C. C. A.) 207 Fed. 495, where a purchase of pledged collateral by the pledgee was held, under the particular circumstances, not to prevent proof against the estate in bankruptcy.

[43] In re Pease, 6 N. B. R. 173, Fed. Cas. No. 10,880; In re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519. So of an agreement by one creditor to advance funds to effect a composition, on condition that his claim should be paid in full. In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365.

the act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the latter's bankruptcy, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy, nor subordinate it to the claims of subsequent creditors.[44] Such fraudulent conduct on the part of a creditor as will forfeit his right to prove against the bankrupt estate may also operate to the disadvantage of others who, though not directly implicated, are still bound by his acts, as in the case of a partner who, though innocent himself, cannot disavow fraudulent acts of his copartner done in the firm name.[45] And where the holder of a note has forfeited his claim against the estate of the bankrupt maker by taking a preference, the guarantors of the note have no right to prove it against the estate, their liability having been discharged by the principal.[46] But it has been ruled in a well-considered case that where a creditor advances money to his debtor, knowing him to be insolvent, but believing that the loan will enable him to regain sufficient prosperity to pay off his debts, the mere fact that the creditor omits to notify the other creditors of the debtor's insolvency does not constitute a breach of duty, or a fraud or deceit on the other creditors, or authorize the disallowance of such creditor's claim against the debtor's estate in bankruptcy. For each creditor of an insolvent debtor is a competitor of all the others, and no fiduciary or confidential relation exists between them; and to constitute such a fraud as will estop a creditor from sharing with others in the distribution of the estate, he must have been guilty of some moral turpitude or breach of duty whereby the other creditors were deceived to their damage.[47]

§ 491. **Nature of Claims Provable in General.**—In general, it may be stated that every debt which is recoverable either at law or in equity is provable in bankruptcy,[48] or that any debt which may be proved by com-

[44] In re Ewald & Brainard, 135 Fed. 168, 14 Am. Bankr. Rep. 267; In re Abell, 198 Fed. 484, 117 C. C. A. 243. But see In re Thweatt, 199 Fed. 319, 29 Am. Bankr. Rep. 84.

[45] Capelle v. Hall, 12 N. B. R. 1, Fed. Cas. No. 2,391.

[46] In re Ayers, 6 Biss. 48, Fed. Cas. No. 685.

[47] Crowder v. Allen-West Commission Co., 213 Fed. 177, 129 C. C. A. 521, 32 Am. Bankr. Rep. 134.

[48] In re Jordan, 2 Fed. 319; In re H. V. Keep Shirt Co., 200 Fed. 80, 28 Am. Bankr. Rep. 765. See In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365. "Provable" debts and "allowable" debts in bankruptcy are not necessarily equivalent terms. On the distinction, see R. P. Williams & Co. v. United States Fidelity & Guaranty Co., 11 Ga. App. 635, 75 S. E. 1067. Claims which are entitled to priority under the statute (such as claims for wages of labor) are provable and must be proved. But the fact that a father employed his minor son to work as his chief clerk, while the son paid board to his mother, does not establish an emancipation of the son, so as to entitle him to prove a claim for wages against his father's estate. In re Riff, 205 Fed. 406, 30 Am. Bankr. Rep. 504. Compare In re Kanter (D. C.) 215 Fed. 276.

plying with any of the provisions of the statute is provable,[49] and the fact that a claim arises as a consequence of the bankruptcy is sufficient to render it provable as a fixed liability absolutely owing at the date of the petition.[50] A claim against the bankrupt for money loaned is liquidated and provable,[51] and claims upon an "open account" (which is the same thing as an "account current") are specially enumerated by the statute as among the claims which shall be provable.[52] Again, it is no objection to the proof and allowance of a claim that it is of such a character as not to be barred or released by the bankrupt's discharge, as in the case of a debt created by his fraud or created by him while acting in a fiduciary capacity.[53] And a debt evidenced by a note or other writing is provable notwithstanding the fact that it is expressed to be payable in a particular species of currency or in gold coin,[54] or even in labor and merchandise.[55] An attorney may file and prove a claim against the bankrupt for professional services rendered to him before the bankruptcy and in matters not connected therewith, although there was no express contract fixing the amount of his fees,[56] at least where his services conduced to the benefit of the estate or to its more prompt administration, as where they resulted in obtaining a reduction of taxes assessed

[49] Rankin v. Florida, A. & G. C. R. Co., 1 N. B. R. 647, Fed. Cas. No. 11,567. The fact that certain claims may be entitled to payment in priority to the claim of a particular creditor does not affect his right to prove the claim and have it allowed. McKey v. Bruns, 243 Fed. 370, 156 C. C. A. 150, 40 Am. Bankr. Rep. 189.

[50] In re Neff, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, 19 Am. Bankr. Rep. 23, 911.

[51] In re Halsey Electric Generator Co. (D. C.) 163 Fed. 118, 20 Am. Bankr. Rep. 738. Where a loan was in fact made to the corporation which is in bankruptcy, the claim is provable against it, though evidenced by the individual notes of its executive officers. Hogin v. Central Nat. Bank, 223 Fed. 325, 138 C. C. A. 587, 35 Am. Bankr. Rep. 81. Where a subscriber for an increase of stock paid the price thereof in advance, under an agreement that such payment should be treated as a loan until the issuance of the stock, and before that the corporation was adjudged bankrupt, the subscriber was entitled to have his claim allowed as a general claim against the bankrupt. Clark v. Hamilton, 217 Fed. 229, 133 C. C. A. 223, L. R. A. 1918E, 750, 33 Am. Bankr. Rep. 198.

[52] In re Stanton, Fed. Cas. No. 13,295. "An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many; or where there have been running or current dealings between the parties, and the account is kept open with the expectation of fresher transactions." Sheppard v. Wilkins, 1 Ala. 62; Goodwin v. Harrison, 6 Ala. 438. An open account, in legal as well as in ordinary language, means an indebtedness subject to future adjustment, and which may be reduced or modified by proof. Nisbet v. Lawson, 1 Ga. 275; Gayle v. Johnston, 72 Ala. 254, 47 Am. Rep. 405; McCamant v. Batsell, 59 Tex. 368; Purvis v. Kroner, 18 Or. 414, 23 Pac. 260.

[53] In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700.

[54] In re Whittaker, 4 N. B. R. 160, Fed. Cas. No. 17,598; In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326.

[55] In re Spot Cash Hooper Co., 188 Fed. 861, 26 Am. Bankr. Rep. 546; McMullin v. Bank of Penn Township, 2 Pa. St. 343.

[56] In re Coney Island Lumber Co., 199 Fed. 803.

against the property or stopping the prosecution of an attachment suit.[57] So a ward may prove his claim against his guardian's estate in bankruptcy, notwithstanding the fact that the accounts of the guardian are in course of settlement in the probate court of the state.[58] The government also, if it holds a claim against a debtor in bankruptcy, may and should file proof of the same.[59] In the case of a bankrupt insurance company, under the former statute, it was held that a claim founded on a covenant to repay part of the premium paid for insurance on cancellation of the policy was provable.[60] And although money advanced to the bankrupt was purely in the form of a bonus, to induce him to erect and operate a manufacturing plant in a given locality, yet on his failure to do so and his ensuing bankruptcy, the amount so paid constitutes a provable claim.[61] Again, although the debt was not originally contracted by the bankrupt, yet if he assumed and agreed to pay it (as in the case of one buying a going business and taking the assets and liabilities together, or buying mortgaged land with an assumption of the mortgage), it will be provable against his estate.[62] So where a sale by an insolvent person, the proceeds of which were used to pay certain creditors in full, was set aside as constructively fraudulent as to other creditors, the vendee has a valid claim against the vendor's trustee in bankruptcy for the amount of the money he paid, less the expenses of setting aside the sale.[63] In those states also where the separate property of a married woman is liable in equity for her business obligations, though under the local law she is not technically a free trader, if she engages in business on her own account, her obligations contracted in the business are provable debts in bankruptcy.[64]

But on the other hand, the amount contributed by a partner to the capital of the partnership cannot, on the bankruptcy of the firm, be proved as a debt entitled to share ratably with the claims of the general creditors.[65] And so, where one induces others to join with him in a pur-

[57] In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450.

[58] Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700.

[59] United States v. Murphy, 11 Biss. 415, 15 Fed. 589.

[60] In re Independent Ins. Co., 2 Low. 187, Fed. Cas. No. 7,019. But see In re Western Ins. Co., 6 Ben. 159, Fed. Cas. No. 17,435.

[61] Sturgiss v. Meurer, 191 Fed. 9, 111 C. C. A. 551, 26 Am. Bankr. Rep. 851.

[62] In re Baumblatt, 153 Fed. 485, 18 Am. Bankr. Rep. 720; Begein v. Brehm, 123 Ind. 160, 23 N. E. 496. But the estate of a bankrupt, who was defrauded of a stock of merchandise by another, but afterwards recovered it by suit, cannot be held liable for debts contracted by such other while conducting the business in his own name. Van Slyke v. Huntington (C. C. A.) 265 Fed. 86, 45 Am. Bankr. Rep. 173.

[63] Barber v. Coit, 144 Fed. 381, 75 C. C. A. 319, 16 Am. Bankr. Rep. 419.

[64] MacDonald v. Tefft-Weller Co., 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106, 11 Am. Bankr. Rep. 800.

[65] In re W. J. Floyd & Co., 156 Fed. 206, 19 Am. Bankr. Rep. 438. And money invested and lost by a creditor of a corporation by subscribing to its capital stock cannot be included in his claim in bankruptcy. In re Franklin Brewing Co.

chase of property, by representations as to its value which prove to be incorrect, but without any express promise to reimburse them for any loss which they may sustain, the law will not raise such a promise by implication, so as to create a liability as on an implied contract provable against his estate in bankruptcy.[66] Owelty of partition is a legal charge on the land, but not created by the contract of the parties but by the law, and therefore is not provable in bankruptcy.[67] And where one institutes a suit against his debtor and against another as garnishee, and the latter goes into bankruptcy before the recovery of any judgment, the creditor has no provable claim against the garnishee's estate.[68] Finally it has been held that a claim for an account of profits against an infringer of a patent-right is not provable against his estate in bankruptcy.[69]

§ 492. **Amount of Claim Provable.**—In order to arrive at the correct amount for which a creditor should be allowed to prove, the court will inquire into the accounts and dealings of the parties, and if necessary reduce the amount of the claim as filed.[70] Thus, on a claim by one member of a syndicate of banking firms against the estate of a bankrupt member, the court will examine into the accounts of all the members, in order to make a definite allowance against the bankrupt's estate.[71] So, where a corporation gave its note to a bank for the indebtedness of a third party, for which it was not responsible, and also for its own debt, the note was invalid in the hands of the bank (having knowledge of the facts) to the extent of the amount of the debt of the third party, and it was held that the bank's claim against the estate of the corporation in bankruptcy must be reduced to the amount which the corporation itself owed when the note was given.[72] So again, where a manufacturer consigned goods to factors, who advanced him their notes to an amount larger than was ultimately realized on the goods, which notes were indorsed by him and discounted, and both parties became bankrupt, and the factors, employing the goods then in their possession, made a composition with their creditors, including the holders of the notes, who

(D. C.) 265 Fed. 301, 45 Am. Bankr. Rep. 719.

[66] Switzer v. Henking, 158 Fed. 784, 86 C. C. A. 140, 15 L. R. A. (N. S.) 1151, 19 Am. Bankr. Rep. 300.

[67] Ex parte Walker, 107 N. C. 340, 12 S. E. 136.

[68] Ex parte Columbian Ins. Co., 2 Low. 5, Fed. Cas. No. 3,037.

[69] In re Boston & F. Iron Works (C. C.) 23 Fed. 880, citing Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975.

[70] A claim by a large stockholder of a bankrupt corporation against the estate for merchandise transferred to it at an agreed valuation may be subject to proof to determine the fair market value of the property, and to reduction accordingly. In re Peerless Shoe Co. (D. C.) 226 Fed. 1020, 36 Am. Bankr. Rep. 71.

[71] In re Cooke, 12 N. B. R. 30, Fed. Cas. No. 3,170.

[72] Mapes v. German Bank of Tilden, 176 Fed. 89, 99 C. C. A. 609, 23 Am. Bankr. Rep. 713.

reserved the right to prove in full against all other parties to them, it was held that such creditors, in proving against the estate of the manufacturer, would not be required to give credit for the full amount received by them on the composition, but would be required to abate their proof by giving credit for the property of such manufacturer so employed by the factors, which might, upon their application, have been applied towards paying their debts.[73]

Again, the amount to be allowed on a claim may depend upon an inquiry into and disclosure of the actual and true consideration.[74] Thus, an indorsee before maturity of a negotiable note, without notice of existing equities, can only prove against the estate of the maker the amount paid therefor.[75] And so, where a mortgage is given to indemnify the mortgagee for his advances, and he loans his acceptances to the mortgagor, and, after the bankruptcy of the latter, buys up the paper at a discount, he can charge against the mortgaged property only what he paid in cash to take up the acceptances.[76] But it has been held that the pledgee of notes held to secure a debt in a smaller amount may prove them against the maker's estate to their full amount, and receive dividends to the extent of his debt.[77] The creditor may also be estopped to claim the full nominal amount of his debt or damage, either by his own previous agreement or by his laches or wrongful conduct. Thus, in a case where the fund to be distributed among the creditors of a bankrupt storage company consisted entirely of the proceeds of insurance on the property of such creditors, burned while in storage, the amount of which had been determined by an agreement between the insurers and the respective owners as to the value of the property of each, it was held that the creditors were bound by such valuations as between themselves, and one cannot be permitted to prove a larger claim.[78] So, where the bankrupt's brokers were carrying stocks on a margin, and, at the commencement of the bankruptcy proceedings, could have sold them at a profit, but carried the stocks until a decline and finally sold them at a loss, all without application to the court, it was held that they could not prove their claim for differences against the estate.[79] And on a

[73] Ex parte Harris, 2 Low. 568, 16 N. B. R. 432, Fed. Cas. No. 6,109.

[74] See Edgar v. Ames, 255 Fed. 835, 167 C. C. A. 163, 42 Am. Bankr. Rep. 697.

[75] In re Shelbourne, 19 N. B. R. 359, Fed. Cas. No. 12,745.

[76] Ex parte Ames, 1 Low. 561, 7 N. B. R. 230, Fed. Cas. No. 323.

[77] Bailey v. Nichols, 2 N. B. R. 478, Fed. Cas. No. 741. See Turner v. Metropolitan Trust Co. of City of New York, 207 Fed. 495, 125 C. C. A. 157, 31 Am. Bankr. Rep. 181.

[78] In re Reliance Storage & Warehouse Co., 105 Fed. 351, 5 Am. Bankr. Rep. 249.

[79] In re Daniels, 6 Biss. 405, Fed. Cas. No. 3,566. So, where brokers made an unauthorized pledge of customers' stock, and the pledgee, upon the brokers' bankruptcy, sold a portion of the stock to satisfy the brokers' indebtedness, the stock not so sold, in ascertaining the amount of the claim of the owner thereof, will be valued as of the day upon which the first sale of similar stock was made on

somewhat similar principle, where the general manager of a trading corporation (who was also a stockholder and director) had been allowed a salary for his services at a fixed monthly rate, but by the mere agreement of the board of directors without any by-law or resolution or entry of record, it was held that he was not entitled to prove a claim against the estate of the corporation in bankruptcy for arrears of salary at the rate so fixed, but only for the reasonable value of his services as determined by the court.[80]

In cases of breach of contract, the amount to be proved and allowed is determined by the ordinary rules relating to the measure of damages.[81] Thus, for a buyer's breach of a contract for the manufacture and sale of certain articles of merchandise, the measure of the seller's damage, on the allowance of his claim against the bankrupt estate of the buyer, is the difference between the cost of manufacture and the contract price, notwithstanding the entire lot of goods were not manufactured or ready for delivery.[82] So, where an agreement indemnifying a contractor's surety, containing an assignment of the contractor's plant on the work in case he should be unable to carry out the contract, was executed more than four months before the contractor became bankrupt and while he was solvent, the amount of the surety's claim against the bankrupt is not the amount which the latter might have paid by reason of his liability on the bonds, independent of the plant so assigned, but the amount of the loss the surety might sustain in completing the contract with such aid as he might gain by taking and using the plant.[83]

§ 493. Payment or Satisfaction.—A note which is subject to an offset for a larger amount is not a provable debt in bankruptcy.[84] Nor will a creditor be permitted to prove a claim which he has expressly waived or released to the bankrupt,[85] or which he had previously settled by an accord and compromise, receiving the consideration then agreed on, though less than the amount of the debt,[86] or where he has

the Stock Exchange, where the exchange had been closed because of the war at the time of the filing of the bankruptcy petition, and not opened until more than a month later, during which time the stock had appreciably increased in value. In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[80] In re Grubbs-Wiley Grocery Co. (D. C.) 96 Fed. 183, 2 Am. Bankr. Rep. 442.

[81] Where a bankrupt, on full consideration paid before his bankruptcy, had contracted absolutely to pay the claimant $3 per day during the remainder of his life, the mortality tables should be used to determine the claimant's life. In re Miller (D. C.) 225 Fed. 331, 35 Am. Bankr. Rep. 333.

[82] In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419; Pratt v. Auto Spring Repairer Co., 196 Fed. 495, 116 C. C. A. 261, 28 Am. Bankr. Rep. 483.

[83] Wood v. United States Fidelity & Guaranty Co., 143 Fed. 424, 16 Am. Bankr. Rep. 21.

[84] In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4,932.

[85] See In re Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69.

[86] In re Decker, 8 Ben. 81, Fed. Cas.

once adjusted his claim by accepting from the trustee in bankruptcy a surrender of the property in dispute or a quitclaim deed.[87] Similarly, a vendor of goods under a conditional sale to the bankrupt may (if the transaction is not voidable under the bankruptcy law) affirm the sale and enforce a claim on the notes given by the bankrupt, or he may retake the property, but he cannot do both, and if he chooses the latter course, he cannot then prove the notes as a claim against the estate.[88] Neither will proof be permitted upon so much of a claim as has previously been satisfied by a payment in cash, or by a transfer and acceptance of property,[89] or otherwise. But merely taking a note, without any payment on it, does not discharge an original debt having any privileges under the bankruptcy law, and either may be proved.[90] So while the acceptance of shares of stock in a corporation in lieu of payment of a debt may cancel the debt so that it will no longer be provable in bankruptcy, if the creditor expressly releases the debtor from liability,[91] this is not the case if there is no sufficient proof that the creditor ever accepted the stock,[92] or if it was merely given as a substitute for collateral security held by the creditor and is not of value.[93] Again, where a creditor has received a partial payment on his debt under a general assignment for the benefit of creditors, made before the bankruptcy, he cannot prove for the whole of the debt but only for the balance remaining unsatisfied.[94]

No. 3,723; In re Lathrop, 3 Ben. 490, 3 N. B. R. 410, Fed. Cas. No. 8,103.

[87] Kenyon v. Mulert, 184 Fed. 825, 26 Am. Bankr. Rep. 184; In re Davis, 179 Fed. 871, 24 Am. Bankr. Rep. 667.

[88] In re Norton, 181 Fed. 901, 24 Am. Bankr. Rep. 794; In re Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113. See Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479. Where, prior to the bankruptcy, the claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which he was unsuccessful, he was entitled to file against the bankrupt's estate for the whole claim. In re Venstrom (D. C.) 205 Fed. 325, 30 Am. Bankr. Rep. 569.

[89] In re Carpenter, 179 Fed. 743. See Haas-Baruch & Co. v. Portuondo, 138 Fed. 949, 15 Am. Bankr. Rep. 130. See In re Franklin Brewing Co. (C. C. A.) 272 Fed. 828, 46 Am. Bankr. Rep. 485. Where claimant made advances to the bankrupt to enable her to buy a motor car, and the bankrupt, being unable to repay the advances, delivered the car to claimant, who sold it, the amount received by the claimant from the sale of the car should be credited on the claim. In re Wray, 233 Fed. 418, 147 C. C. A. 354, 37 Am. Bankr. Rep. 28. If a landlord obtains by an action of replevin a part of his rent from the goods of a subtenant upon the premises, his claim against the bankrupt estate of the tenant should be reduced by the amount so received. Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480. The holder of a note indorsed by the bankrupt, not due at the time of the bankruptcy, but which became due before proof of claim, and on which in the mean time a payment was received from the maker, can prove only for the amount due thereon at maturity. In re Shatz, 251 Fed. 351 (D. C.), 41 Am. Bankr. Rep. 576.

[90] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437.

[91] In re Norris (D. C.) 190 Fed. 101, 26 Am. Bankr. Rep. 945.

[92] In re Blumer, 11 Fed. 700.

[93] In re Lorillard, 107 Fed. 677, 46 C. C. A. 553, 5 Am. Bankr. Rep. 602.

[94] In re Folb, 91 Fed. 107, 1 Am. Bankr. Rep. 22; In re Hamilton, 1 Fed. 800.

The case of a creditor whose claim is proved and allowed after the declaration of a dividend is somewhat peculiar. Here the law provides that the proof of such claim shall not affect the dividend so declared, but that such creditor shall receive an equal dividend (if the estate is sufficient) before other creditors receive any further dividends. But where the holder of a note made by a partnership and indorsed by one of the partners, both maker and indorser having been adjudicated bankrupts, proves his claim against the partnership estate after a dividend has been declared and paid to other creditors, his right to a preference in future dividends cannot be considered equivalent to a dividend actually declared in his favor, or to an actual part payment of his note by the maker, and hence he is entitled to prove his claim against the estate of the indorser for the full amount of the note.[95] Generally, however the holder of a note who has received a dividend from the estate in bankruptcy of the maker, can prove only the balance against the estate of the bankrupt indorser.[96] But on the other hand, a creditor whose claim has been partly paid by an accommodation indorser may prove the claim to its full amount without giving the estate the benefit of such part payment.[97] And so, where a creditor has received partial payment of his debt from a surety of the bankrupt, the right to prove the claim for its entire amount, against the estate in bankruptcy, is in the creditor in preference to the surety.[98]

§ 494. Time of Accrual of Claims.—The provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy, which is the date when the right of creditors to share in the estate becomes fixed; and any claim which is not then a provable debt, as defined in the act, cannot be proved although it may thereafter come within such definition.[99] And a debt or claim which did not accrue or come into existence until after the filing of the petition is not provable,[100] even though it was for money loaned to the bankrupt to be used

[95] In re Swift, 106 Fed. 65, 5 Am. Bankr. Rep. 415.

[96] In re Howard, 4 N. B. R. 571, Fed. Cas. No. 6,750; In re Pulsifer, 9 Biss. 487, 14 Fed. 247.

[97] In re Noyes Bros., 127 Fed. 286, 62 C. C. A. 218, 11 Am. Bankr. Rep. 506; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673. But see In re Broich, 7 Biss. 303, 15 N. B. R. 11, Fed. Cas. No. 1,921. See A. S. Coats Shingle Co. v. Chester Snow Log & Shingle Co., 106 Wash. 227, 179 Pac. 862.

[98] In re Heyman, 95 Fed. 800, 2 Am. Bankr. Rep. 651.

[99] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493; Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, 25 Am. Bankr. Rep. 363; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Pettingill & Co., 137 Fed. 143, 14 Am. Bankr. Rep. 728.

[100] Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Walker, 176 Fed. 455, 23 Am. Bankr. Rep. 805; In re Reading Hosiery Co., 171 Fed. 195, 22 Am. Bankr. Rep. 562; In re Rome, 162 Fed. 971, 19 Am.

in complying with the terms of a composition agreement.[101] And it is immaterial that the debt accrued or came into existence before any adjudication was made upon the petition, if it did not exist when the petition was filed; for the statute is explicit in fixing the date of filing the petition, and not the date of the adjudication, as the decisive time.[102] An apparent exception to the rule here mentioned, but really only an extension of it, is found in the case where the filing of the petition in bankruptcy itself operates as a breach of an executory contract, because equivalent to a refusal to perform. Here the filing of the petition and the accrual of a claim for damages are exactly contemporaneous, and the creditor may prove his claim for damages as one existing at the time of the filing of the petition.[103] Although the first subdivision of the sixty-third section of the bankruptcy act is the one which defines a provable debt as one "absolutely owing at the time of the filing of the petition," and this language is not repeated in the fourth subdivision, which allows proof of a claim "founded upon an open account or upon a contract express or implied," yet the decisions unanimously hold that the limitation of time contained in the first subdivision must be read into the fourth, the two being in pari materia, and hence a claim founded upon an open account or a contract is not provable in bankruptcy, any more than any other kind of claim, unless it existed at the time of the filing of the petition.[104] Further, a debt to be provable in bankruptcy, must continue to exist in the same condition after as at the time of the commencement of the proceedings; and proof of a claim as indorser upon a note made by the bankrupt will be disallowed where it appears that, after the adjudication of bankruptcy, a new note had been given and the first note taken up.[105] On this principle also, a claim against a bankrupt for work done under a contract after the filing of the

Bankr. Rep. 820; In re Black Diamond Copper Mining Co., 11 Ariz. 415, 95 Pac. 117; In re Riker, 18 N. B. R. 393, Fed. Cas. No. 11,833; In re Merell, 19 Fed. 874; In re Ward, 12 Fed. 325; Phenix Nat. Bank v. Waterbury, 123 App. Div. 453, 108 N. Y. Supp. 391; Hardcastle v. National Clothing Co., 137 Tenn. 64, 191 S. W. 524. On bankruptcy of the debtor, each creditor becomes an equitable cestui que trust in the assets in the ratio which his claim bears to the total amount, and his right to participate may not be diminished by claims arising subsequently to the bankruptcy, his right to participate being determined as of the date of the bankruptcy. In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[101] Zavelo v. J. S. Reeves & Co., 171 Ala. 401, 54 South. 654.

[102] In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12; In re Merrill, 21 Fed. 120. Compare Spalding v. Dixon, 21 Vt. 45.

[103] In re Swift, 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374.

[104] Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Swift, 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374; In re Adams, 130 Fed. 381, 12 Am. Bankr. Rep. 368; In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12.

[105] In re Montgomery, 3 N. B. R. 426, Fed. Cas. No. 9,730.

petition cannot be proved as a debt against the estate, although the contract was entered into before the commencement of the proceedings, but was then wholly executory.[106]

Judgments recovered against the bankrupt after the filing of the petition, and before consideration of his application for a discharge, may be proved as debts, but only on condition that they are founded on debts provable at the commencement of the proceedings, and even in that case there must be deducted costs incurred and interest accrued after the filing of the petition and up to the time of the entry of judgment.[107]

§ 495. Claims on Contracts and Damages for Breach Thereof.—Claims founded upon an "open account or upon a contract express or implied" are specifically made provable by the bankruptcy act, and this clause is not limited by the provision in an earlier part of the same section that debts may be proved and allowed which are "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing." [108] Hence an account for the balance due for goods sold and delivered is a provable debt,[109] as is also the amount due on a conditional sale of property, assuming that that form of contract is not invalid under the laws of the state,[110] or a fixed sum due for subscriptions to a mercantile agency,[111] or a claim for damages for breach of an appeal bond.[112]

Moreover, a claim for damages for the breach of an executory contract is a claim "founded upon a contract" within the meaning of the statute, and is provable in bankruptcy, equally as in the case where the contract itself is for the payment of a fixed sum.[113] And if the bankrupt,

[106] In re Adams, 130 Fed. 381, 12 Am. Bankr. Rep. 368.

[107] Bankruptcy Act 1898, § 63a, cl. 5. See In re Fitzgerald, 191 Fed. 95, 28 Am. Bankr. Rep. 773; United States v. The Rob Roy, 1 Woods, 42, 13 N. B. R. 235, Fed. Cas. No. 16,179.

[108] In re Lyons Beet Sugar Refining Co. (D. C.) 192 Fed. 445, 27 Am. Bankr. Rep. 610. But compare In re D. C. Clark Shoe Co. (D. C.) 211 Fed. 341, 32 Am. Bankr. Rep. 238. A cause of action sounding either in contract or tort at the election of the holder is a provable claim in bankruptcy. Reinhardt v. Friederich, 58 Ind. App. 421, 108 N. E. 258. A claim on a protested check, which was given to make good an overpayment on an account for goods sold, is a cause of action in contract and provable in bankruptcy. Stewart Petroleum Co. v. Boardman, 264 Fed. 826, 45 Am. Bankr. Rep. 573. Where a bankrupt, on full consideration paid before the bankruptcy, contracted absolutely to pay the claimant $3 a day during the remainder of his life, the claim is fixed and provable. In re Miller (D. C.) 225 Fed. 331, 35 Am. Bankr. Rep. 333.

[109] Standard Sewing Machine Co. v. Kattell, 132 App. Div. 539, 117 N. Y. Supp. 32.

[110] In re Gray, 170 Fed. 638, 21 Am. Bankr. Rep. 375.

[111] In re Glick, 184 Fed. 967, 25 Am. Bankr. Rep. 871.

[112] Coe v. Waters, 16 Colo. App. 311, 64 Pac. 1054.

[113] In re Frederick L. Grant Shoe Co., 130 Fed. 881, 66 C. C. A. 78, 12 Am. Bankr. Rep. 349; In re Adams, 130 Fed. 381, 12 Am. Bankr. Rep. 368; In re Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. Bankr. Rep. 569; In re Swift, 112 Fed. 316, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374; Ex

at the time of the bankruptcy, by disenabling himself from performing his part of a particular contract, and by repudiating its obligation, could give to the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such other party may prove as a creditor in the bankruptcy proceedings, on the ground that bankruptcy is the equivalent of disenablement and repudiation or is an anticipatory breach of the contract.[114] But this is on the supposition that the claimant is not himself in default, for if he has failed to carry out his own part of the contract he cannot file a claim for damages.[115] And in no case can his claim be allowed for more than the actual damage sustained. Thus, the courts will not allow the creditor to take this means of enforcing a mere penalty,[116] or the collection of a sum named in the contract as liquidated damages in case of default, where it is not shown that the claimant has sustained any actual damage by the bankrupt's breach of the contract.[117] So, in a case where one holding a patent for an invention had granted to a corporation an exclusive license to manufacture the product, and the corporation had thereupon contracted to pay to the patentee a bonus or royalty on the patented articles sold with a guaranty of a minimum number during the year, and the corporation became bankrupt before the end of the year, it was held that the patentee was entitled to prove a claim for the amount of royalty which had accrued up to the time of the bankruptcy at the minimum rate, irrespective of the number of articles actually sold, but that he could not prove a claim for future royalties accruing during the remainder of the term, although he was entitled to prove a claim for damages

parte Pollard, 2 Low. 411, 17 N. B. R. 228, Fed. Cas. No. 11,252; Forest City Steel & Iron Co. v. Detroit & T. S. L. R. Co., 154 Mich. 182, 117 N. W. 645; Lothrop v. Reed, 13 Allen (Mass.) 294. Compare Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453.

[114] Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, 36 Am. Bankr. Rep. 679; In re Pettingill & Co., 137 Fed. 143, 14 Am. Bankr. Rep. 728; In re Swift, 105 Fed. 493, 5 Am. Bankr. Rep. 335; In re Saxton Furnace Co., 142 Fed. 293, 15 Am. Bankr. Rep. 445; Pratt v. Auto Spring Repairer Co. (C. C. A.) 196 Fed. 495, 28 Am. Bankr. Rep. 483; In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419; In re Spittler, 151 Fed. 942, 18 Am. Bankr. Rep. 425; In re Neff, 157 Fed. 57, 84 C. C. A. 561, 19 Am. Bankr. Rep. 911; In re National Wire Corp., 166 Fed. 631, 22 Am. Bankr. Rep. 186; Wood v. Fisk, 156 App. Div. 497, 141 N. Y. Supp. 342. Contra, In re Imperial Brewing Co., 143 Fed. 579, 16 Am. Bankr. Rep. 110; In re Inman & Co., 175 Fed. 312, 23 Am. Bankr. Rep. 566; Board of Commerce of Ann Arbor v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486, 34 Am. Bankr. Rep. 762; In re Frank E. Scott Transfer Co., 216 Fed. 308, 132 C. C. A. 452. See In re 35% Automobile Supply Co. (D. C.) 247 Fed. 377, 41 Am. Bankr. Rep. 101; In re Leslie & Griffith Co. (D. C.) 230 Fed. 465, 36 Am. Bankr. Rep. 744. See Heyward v. Goldsmith (C. C. A.) 269 Fed. 946, 46 Am. Bankr. Rep. 722.

[115] In re Morgantown Tin Plate Co., 184 Fed. 109, 25 Am. Bankr. Rep. 836.

[116] In re Bevier Wood Pavement Co., 156 Fed. 583, 19 Am. Bankr. Rep. 462.

[117] Northwest Fixture Co. v. Kilbourne & Clark Co., 128 Fed. 256, 62 C. C. A. 638, 11 Am. Bankr. Rep. 725.

for the breach of the contract, to be estimated in view of the fact that, the license having fallen in, he was at liberty to dispose of it again.[118]

The case of the breach of a contract of employment presents somewhat different features. One employed as a salesman, superintendent, manager, secretary, etc., may regard his contract of employment as dissolved by the employer's adjudication in bankruptcy (especially, it is said, in the case where the bankrupt is a corporation or a partnership) and may prove a claim for the unpaid balance of his salary to the time of the filing of the petition,[119] if it was fixed by a valid written contract or other instrument, or otherwise he may claim the reasonable value of his services.[120] But as to the right to prove a claim for so much of the agreed salary as would have been earned and payable (if bankruptcy had not intervened) from the date of the bankruptcy to the end of the stipulated period of employment, the decisions are not altogether in harmony. It has been ruled that the measure of the employé's damages in such a case would be the amount which he would have received under the contract for the remainder of the term fixed, less such amount as he would be able to earn during that time from other sources.[121] But the preponderance of authority is to the effect that the employé cannot prove a claim for any salary beyond the date of the filing of the petition in bankruptcy, on the theory that his expectation of receiving a salary during the remainder of the term, if it can be called a debt or a claim for damages, is no more than a contingent liability, and the present statute has made no provision for the proof or allowance of claims of that character.[122] The rule is substantially the same where the contract required the payment of commissions to a salesman in addition to his salary. Such commissions as were actually earned before the date of bankruptcy constitute a provable debt, but a claim for commissions on sales which possibly or probably might have been made if the contract had continued to its appointed term is too speculative and remote to be available as a provable debt in bankruptcy.[123]

[118] In re Dr. Voorhees Awning Hood Co., 187 Fed. 611.

[119] Ex parte Pollard, 2 Low. 411, 17 N. B. R. 228, Fed. Cas. No. 11,252. See In re B. H. Gladding Co., 120 Fed. 709, 9 Am. Bankr. Rep. 700.

[120] In re Grubbs-Wiley Grocery Co., 96 Fed. 183, 2 Am. Bankr. Rep. 442. And see In re McCarthy Portable Elevator Co., 196 Fed. 247, 28 Am. Bankr. Rep. 45.

[121] In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83; In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604.

[122] In re Inman & Co., 171 Fed. 185, 22 Am. Bankr. Rep. 524; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; In re Dr. Voorhees Awning Hood Co., 187 Fed. 611; Orr v. Ward, 73 Ill. 318; In re D. Levy & Sons Co., 208 Fed. 479, 31 Am. Bankr. Rep. 25; In re Montague & Gillet (D. C.) 212 Fed. 452, 32 Am. Bankr. Rep. 106.

[123] See Clairemonte v. Napier Motor Co., 11 Cal. App. 265, 104 Pac. 712; In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83.

§ 496. Promissory Notes; Consideration; Good Faith of Holder.—A promissory note is a provable debt in bankruptcy as being a "fixed liability evidenced by an instrument in writing," and may be proved by the payee or indorsee as the case may be.[124] Notes made by a corporation are provable against its estate in bankruptcy, if duly executed under proper authority and for a legitimate corporate purpose.[125] And a claim on a note may be proven against the estate of the bankrupt indorser.[126] Under former statutes it was held that a note was none the less provable in bankruptcy because it was payable in specific articles on demand,[127] though such a claim would probably now be regarded as an unliquidated demand, and its equivalent in cash would have to be fixed before proving.

But a claim founded on a promissory note will not be allowed where it appears that it was not founded upon a good and valid consideration,[128] and a renewal note, which is not supported by any fresh consideration, is not provable where the original note was without consideration.[129] But a note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consideration and may be proved as a debt in a second bankruptcy proceeding.[130] Further it is necessary that the claimant offering to prove on the note should be a holder in good faith and for value or at least (in the case of a remote indorsee) that he should prove affirmatively that his immediate indorser was a bona fide holder for value.[131] A person to whom notes are sent for discount, and who fails to pay drafts drawn against the proceeds in favor of an indorser of the notes, cannot prove his claim on the notes against the bankrupt payee of the drafts, for, having failed to pay the drafts, he has no right to retain the notes and is not a holder for value.[132] But where the holder of a note is a corporation, its position is not necessarily prejudiced by bad faith or even illegal conduct on the part of one of its officers in regard to the acquisition of the note where full value was given in cash. Thus, in one of the cases it appeared that the cashier of a national bank had discounted notes for the maker of them, far in excess of the amount

[124] In re Shelbourne, 19 N. B. R. 359, Fed. Cas. No. 12,745.

[125] In re New York Car Wheel Works, 141 Fed. 430, 15 Am. Bankr. Rep. 571. See Moerschel v. O'Bannon, 246 Fed. 887, 159 C. C. A. 159, 40 Am. Bankr. Rep. 786.

[126] In re Bruce, 6 Ben. 515, Fed. Cas. No. 2,044.

[127] Chandler v. Windship, 6 Mass. 310; Barker v. Mann, 4 Metc. (Mass.) 302.

[128] In re Hook, 11 N. B. R. 282, Fed. Cas. No. 6,672.

[129] In re Stanford Clothing Co., 187 Fed. 172, 26 Am. Bankr. Rep. 124; In re Cornwall, 4 N. B. R. 400, Fed. Cas. No. 3,251. See In re New York Car Wheel Works, 139 Fed. 421, 14 Am. Bankr. Rep. 595.

[130] In re C. H. Bennett Shoe Co., 162 Fed. 691, 20 Am. Bankr. Rep. 704.

[131] In re Hopper-Morgan Co., 156 Fed. 525, 19 Am. Bankr. Rep. 518, affirmed 166 Fed. 1020, 91 C. C. A. 37.

[132] In re Howard, 6 N. B. R. 372, Fed. Cas. No. 6,751.

which the bank could legally loan to one person, and beyond the ability of the maker and indorser of the notes to pay, and this was done without the knowledge or consent of the other officers of the bank. A criminal prosecution was instituted against the cashier and he was sentenced to imprisonment for misapplying the funds of the bank, and criminal proceedings against the maker of the notes for aiding him in so doing likewise resulted in a conviction. The bank having become insolvent, its receiver sued on the cashier's bond and recovered judgment for the amount of the penalty of such bond. But it was held that these facts did not affect the validity of the notes, nor the bank's ownership of them, and the receiver might prove the same in bankruptcy against the estate of the indorser.[133] A pledgee in good faith and for value of a promissory note, transferred to him before maturity, may prove it for its full amount against the estate in bankruptcy of the maker, whatever may have been the equities between the maker and the pledgor; but if there are such equities as would prevent the pledgor from proving, then the pledgee can receive in dividends only the amount for which he holds the note in pledge.[134]

§ 497. **Judgments.**—Although a verdict, not followed by the entry of judgment before the institution of bankruptcy proceedings, is not a provable debt,[135] yet a judgment recovered before the filing of the petition in bankruptcy is expressly made provable by the terms of the statute,[136] irrespective of the nature of the cause of action in the suit in which it was rendered, and even though that cause of action would not of itself have constituted a provable claim.[137] Hence, provided the judgment was obtained before the beginning of the bankruptcy proceedings, it will be a provable debt when based on a cause of action for obtaining property by false and fraudulent representations,[138] or where the action was in trover to recover goods purchased by the bankrupt while insolvent, no fraudulent misrepresentations being shown,[139] or where the the cause of action was against a city marshal for paying over attached rents to the attaching creditor after notice of an assignee's claim to them,[140] and proof may be made on a judgment against

[133] In re Edson, 119 Fed. 487, 9 Am. Bankr. Rep. 505.

[134] Ex parte Kelty, 1 Low. 394, Fed. Cas. No. 7,681.

[135] In re Ostrom, 185 Fed. 988, 26 Am. Bankr. Rep. 273; Black v. McClelland. 12 N. B. R. 481, Fed. Cas. No. 1,462.

[136] Johnson v. Joslyn, 45 Wash. 310, 88 Pac. 324; Graham v. Pierson, 6 Hill (N. Y.) 247; People's Nat. Bank v. Maxson, 168 Iowa, 318, 150 N. W. 601.

[137] Howland v. Carson, 28 Ohio St. 625. But compare Turner v. Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289, holding that a judgment for allmony is not a provable debt, as to which see infra, § 509.

[138] In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478.

[139] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862.

[140] Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655.

the bankrupt for injuries to the judgment creditor's property caused by the bankrupt's negligence,[141] or for damages sustained by the creditor in an automobile accident.[142] The same conditions being fulfilled, as to the time of recovery of the judgment, a judgment in an action for a tort, such as fraud, conspiracy, or deceit, is provable in bankruptcy,[143] and so is a judgment for damages for negligence causing death,[144] or for breach of promise of marriage,[145] or a judgment recovered by a woman against her seducer,[146] or one fixing the liability of a stockholder of an insolvent corporation for a contribution equal to the amount of his stock to pay its debts.[147] Further, the judgment is conclusive of the validity and amount of the claim,[148] though it may perhaps be impeached on the ground of fraud or collusion in its procurement or for want of jurisdiction.[149] And its conclusiveness, and its availability as a provable claim, are not impaired by the fact that an appeal is pending or a writ of error with supersedeas of execution.[150] But this effect cannot be attributed to a mere decree nisi which, under the law of the state, is only preliminary and requires a further order to make it final.[151] It has also been held that, for the purpose of proving a claim in bankruptcy, a debt is not so merged in a judgment recovered upon it that the judgment must be proved instead of the debt. Hence where a creditor has a provable claim and has brought suit upon it before the adjudication in bankruptcy, and recovers a judgment after the adjudication and before the debtor's application for discharge, he may prove the original debt, although the judgment was for a less sum than the debt claimed and offered for proof.[152]

As to the effect of a judgment recovered after the commencement

[141] In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560.

[142] Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[143] Landgraf v. Griffith, 41 Ind. App. 372, 83 N. E. 1021.

[144] In re Putnam, 193 Fed. 464, 27 Am. Bankr. Rep. 923.

[145] In re Fife, 109 Fed. 880, 6 Am. Bankr. Rep. 258; In re Sidle, 2 N. B. R. 220, Fed. Cas. No. 12,844.

[146] In re McCauley, 101 Fed. 223, 4 Am. Bankr. Rep. 122.

[147] Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

[148] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

[149] In re Pease, 2 Nat. Bankr. News, 657; In re Phelps, 2 Nat. Bankr. News, 481; In re Van Buren, 19 N. B. R. 149, Fed. Cas. No. 16,833.

[150] In re Leszynsky, 3 Ben. 487, Fed. Cas. No. 8,278; In re Sheehan, 8 N. B. R. 356, Fed. Cas. No. 12,737; In re Berlin Dye Works & Laundry Co. (D. C.) 225 Fed. 683, 34 Am. Bankr. Rep. 823; Moore v. Douglas, 230 Fed. 399, 144 C. C. A. 541, 36 Am. Bankr. Rep. 740.

[151] In re Wiseman, 123 Fed. 185, 10 Am. Bankr. Rep. 545, affirmed Hibberd v. Bailey, 129 Fed. 575, 64 C. C. A. 143, 12 Am. Bankr. Rep. 104.

[152] In re Pinkel, 1 Nat. Bankr. News 138; In re Brown, 5 Ben. 1, 3 N. B. R. 584, Fed. Cas. No. 1,975; In re Crawford, 3 N. B. R. 698, Fed. Cas. No. 3,363; In re Stansfield, 4 Sawy. 334, 16 N. B. R. 268, Fed. Cas. No. 13,294; In re Vickery, 3 N. B. R. 696, Fed. Cas. No. 16,930; Blair v. Carter, 78 Va. 621. And see In re Smith, 176 Fed. 426, 23 Am. Bankr. Rep. 864.

of the bankruptcy proceedings, upon a pre-existing debt, the terms of the act of 1867 were made the subject of various and conflicting decisions by the courts.[153] But the question has been clearly settled by the language of the present statute, which includes among the "debts which may be proved" those which are "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments." [154] Under this provision, a creditor holding a promissory note, valid and enforceable against the maker at the date of the latter's adjudication in bankruptcy, but against which the statute of limitations has nearly run, may reduce the same to judgment by suit brought in a state court after such adjudication, and the judgment will establish the claim and stop the running of the statute, though it will not give the creditor a lien or priority or enable him to levy on the bankrupt's property.[155] But a judgment so recovered will not be provable in bankruptcy unless the claim or demand in suit was a provable debt at the date of the filing of the petition. Thus, a claim for damages for negligence causing personal injuries is not a provable debt, and it is not made provable by the recovery of a judgment on it after the filing of the petition in bankruptcy.[156] And if the claim (for damages) was not of a provable character, a judgment upon it against the bankrupt in a state court, actually rendered after the bankruptcy, will not be a provable debt, although, by direction of an appellate court, which reversed a judgment in the bankrupt's favor, it was entered nunc pro tunc as of the date of the reversed judgment, which was before the bankruptcy.[157]

It is also a provision of this part of the statute that the judgment, to be provable as a debt, should have been rendered before the consideration of the bankrupt's application for discharge. But it has sometimes been held by the state courts that they may render final judgment against the bankrupt after his discharge, though in this case the

[153] See Black v. McClelland, 12 N. B. R. 481, Fed. Cas. No. 1,462; In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; In re Stansfield, 4 Sawy. 334, 16 N. B. R. 268, Fed. Cas. No. 13,294; In re Gallison, 2 Low. 72, 5 N. B. R. 353, Fed. Cas. No. 5,203; In re Williams, 2 N. B. R. 229, Fed. Cas. No. 17,705; Randall v. Sutton, 2 Houst. (Del.) 510.

[154] Bankruptcy Act 1898, § 63a, clause 5. See In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729. Compare Hackett v. Supreme Council A. L. H., 206 Mass. 139, 92 N. E. 133. And see Gordon v. Texas Co., 119 Me. 49, 109 Atl. 368.

[155] In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729.

[156] In re Crescent Lumber Co., 154 Fed. 724, 19 Am. Bankr. Rep. 112. But see In re Standard Aero Corp. of New York (C. C. A.) 270 Fed. 779, 46 Am. Bankr. Rep. 511.

[157] In re Kroeger Bros. (D. C.) 262 Fed. 463, 45 Am. Bankr. Rep. 135.

judgment merely establishes the amount of the debt or claim, and it should be framed in such limited form as not to involve a judgment in personam, though adequate to enable the creditor to reap the benefit of his proof of claim.[158]

The judgments spoken of in this part of the statute are evidently those recovered against the bankrupt himself. Judgments against the trustee in bankruptcy apparently stand upon a different footing. At least it has been held, in a case where the trustee, eighteen months after the adjudication, brought an action in a state court against a supposed debtor of the estate, but was defeated, and the defendant recovered a judgment on a counterclaim against the bankrupt, that the trustee was liable for the costs of the action, but that the creditor, having filed no claim within the time allowed, could not prove his judgment against the estate.[159]

§ 498. Equitable Claims and Demands.—As courts of bankruptcy have jurisdiction in equity as well as at law, equitable claims against a bankrupt are provable if within the purview of the general rules of equity, even though they have no status at law.[160] Thus, in one case, it appeared that the wife of a bankrupt had loaned a large sum of money to a partnership of which her husband was a member. It was argued that she could not file a claim for the money against the estate in bankruptcy, for the reason that, under the local law, a married woman could not make contracts with her husband. But it was held that in equity, and therefore in bankruptcy, a married woman could contract with her husband in relation to her separate estate and even sue him with regard to it, and hence the claim in question, being enforceable in equity was provable in bankruptcy.[161] But a mere claim in equity to rescind a contract is not a "debt" which is provable in bankruptcy.[162]

§ 499. Contingent Demands and Liabilities.—The bankruptcy act of 1841 provided for the proving of "uncertain or contingent demands" against the estate of the bankrupt. But it was held that, so long as it

[158] Barry v. New York Holding & Construction Co., 229 Mass. 308, 118 N. E. 639.

[159] In re Havens (D. C.) 182 Fed. 367, 25 Am. Bankr. Rep. 116.

[160] In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Upson, 123 Fed. 807, 10 Am. Bankr. Rep. 602; Sigsby v. Willis, 3 Ben. 371, 3 N. B. R. 207, Fed. Cas. No. 12,849; In re Blandin, 1 Low. 543, 5 N. B. R. 39, Fed. Cas. No. 1,527; In re Buckhause, 2 Low. 331, 10 N. B. R. 206, Fed. Cas. No. 2,086; In re Coney Island Lumber Co., 199 Fed. 803; Walter v. Atha (C. C. A.) 262 Fed. 75, 45 Am. Bankr. Rep. 150.

[161] In re James, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, 12 Am. Bankr. Rep. 573. And see In re Batchelder & Lincoln Co., 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641; In re Jordan & Blake, 2 Fed. 319.

[162] Doggett v. Emerson, 1 Woodb. & M. 195, Fed. Cas. No. 3,962.

remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there were no means of removing the uncertainty by calculation, the contract or engagement was not provable.[163] The act of 1867 provided for the proof and allowance of "contingent debts and contingent liabilities," but only in case the contingency should happen before the order for the final dividend.[164] The present statute makes no provision whatever for the proof of contingent claims or demands, and therefore they are not provable.[165] A contingent claim, in this sense, has been defined as one where "all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed." [166] Thus, bonds of a corporation which by their terms were payable only out of funds created from the surplus earnings of the company are not provable in bankruptcy against the company, where there never had been any surplus earnings, and such funds had therefore never been created.[167] And in other cases it has been thought to be a claim "the valuation or estimation of which it is substantially impossible to prove," on account of the uncertain or fortuitous elements which might enter into it.[168] But perhaps it is a better definition to say that a "contingent" claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it.[169] If it is certain that he will have to pay the claim, or some proportion of it, though it cannot yet be said when he will have to pay or how much, the claim is "unliquidated" but not contingent. In this view the liability of an indorser of the bankrupt's promissory note, not due at the time of the filing of the petition, is no real exception to the rule against proving contingent demands.[170] On the oth-

[163] Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 282.

[164] Zimmer v. Schleehauf, 115 Mass. 52, 11 N. B. R. 313.

[165] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; In re Inman & Co., 171 Fed. 185, 22 Am. Bankr. Rep. 524; In re Wilson, 194 Fed. 564, 27 Am. Bankr. Rep. 867; In re Hartman, 166 Fed. 776, 21 Am. Bankr. Rep. 610; Phenix Nat. Bank v. Waterbury, 123 App. Div. 453, 108 N. Y. Supp. 391; Leader v. Mattingly, 140 Ala. 444, 37 South. 270; Cotting v. Hooper, Lewis & Co., 220 Mass. 273, 107 N. E. 931.

[166] Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328. A seller of lumber to an individual, with the understanding that a corporation should take over the lumber, is not entitled, on the corporation's being adjudged a bankrupt, to prove a claim against it for the amount due. In re Lance Lumber Co. (D. C.) 224 Fed. 598.

[167] Synnott v. Tombstone Consol. Mines Co., 208 Fed. 251, 128 C. C. A. 451, 31 Am. Bankr. Rep. 421.

[168] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[169] In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189.

[170] "An apparent exception to the rule that contingent claims may not be proved under section 63a is the case of an indorser of the commercial paper of the bankrupt, not due at the time of the filing of the petition, but whose liability

er hand, the liability of a bankrupt on a guaranty executed by him of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition in bankruptcy, is so far contingent that a claim based thereon is not a provable debt.[171] And the same rule has been applied to an agreement by the bankrupt to pay an annuity to his divorced wife "during her life or until she remarries."[172] And so of a claim against the bankrupt by his lessee for prospective profits of the business conducted at a stand on the bankrupt's premises, on breach of the lease by the bankrupt.[173] Nor can a claim be proved on a covenant in a lease permitting the lessor, on default, to re-enter and relet the premises at the risk of the lessee, the latter to remain liable for the rent and be credited with the sums actually realized.[174] But a contract liability of the bankrupt, contingent at the time the petition was filed, but liquidated within the year allowed for making proof, is a provable debt.[175]

The mere giving of notes to evidence, or in prepayment of, obligations which are clearly conditional, will not annul the condition or make an otherwise unprovable claim allowable in bankruptcy.[176] But on the other hand, the pendency of proceedings to open a guardian's settlement of accounts does not preclude the former ward from filing as claims against the guardian on his bankruptcy notes which he had given her for the amount which he admitted to be due.[177]

§ 500. **Unliquidated Demands.**—After enumerating five classes of provable debts, the bankruptcy act provides that "unliquidated claims

as indorser thereafter becomes fixed. Moch v. Market Street Bank, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11; In re Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25; In re Smith, 146 Fed. 923, 17 Am. Bankr. Rep. 112. But it may be doubted whether the liability of an indorser in that class of cases is in any true sense contingent. The extent of his liability is at all times known, for it is measured by the note itself. Upon the adjudication in bankruptcy it would seem that there is an end to the contingency that the bankrupt himself may pay the note, and that there remains between that date and the maturity of the indorser's liability nothing but a question of time." Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328.

[171] In re Pettingill, 137 Fed. 143, 14 Am. Bankr. Rep. 728. Bonds of a corporation which by their terms were payable only out of funds created from the surplus earnings of the company, are not provable in bankruptcy against the company, where there never had been any surplus earnings, and such funds had therefore never been created. Synnott v. Tombstone Consol. Mines Co., 209 Fed. 251.

[172] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[173] In re Leland, 8 Ben. 254, Fed. Cas. No. 8,233.

[174] Ex parte Lake, 2 Low. 544, 16 N. B. R. 497, Fed. Cas. No. 7,991; Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285. And see In re Gallacher Coal Co., 205 Fed. 183, 29 Am. Bankr. Rep. 766.

[175] In re James Dunlap Carpet Co., 163 Fed. 541, 20 Am. Bankr. Rep. 882.

[176] In re Wisconsin Engine Co., 234 Fed. 281, 148 C. C. A. 183, 37 Am. Bankr. Rep. 106.

[177] Beaven v. Stuart, 250 Fed. 972, 163 C. C. A. 222, 41 Am. Bankr. Rep. 81.

against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." [178] But it is held that this clause is not to be understood as defining an additional class of debts which shall be provable. It relates merely to procedure, and provides for the liquidation of such of the claims enumerated in the preceding paragraph as may require that process in order to fix their amount. In other words, it covers only such claims as, when liquidated, will be provable debts under the specifications of the preceding paragraph, and does not enlarge the class of provable debts, nor permit the proof of claims for damages for torts not reduced to certainty by judgment.[179]

The difference between a liquidated and an unliquidated claim relates only to the certainty of its amount, not to the certainty of its being due.[180] That is, the term "unliquidated claims" includes demands for which the bankrupt is certainly answerable in some sum, though that sum is not yet ascertained, but not demands for which he may not be liable at all.[181] Thus, a claim for damages for breach of a contract, where the amount of damages is to be ascertained by proof and not by mere calculation, is an unliquidated demand,[182] and so is the liability

[178] Bankruptcy Act 1898, § 63b.

[179] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 747, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; In re Southern Steel Co., 183 Fed. 489, 25 Am. Bankr. Rep. 358; In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25; In re Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715; Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565. As to claims for unliquidated damages for torts, not reduced to judgment, see infra, § 514.

Moore v. Douglas, 230 Fed. 399, 144 C. C. A. 541, 36 Am. Bankr. Rep. 740. The claim of an injured employee against his employer, unliquidated and not reduced to judgment until after the employer's adjudication in bankruptcy, is not a provable debt. Eberlein v. Fidelity & Deposit Co. of Maryland, 164 Wis. 242, 159 N. W. 553.

[180] Where a corporation had made an assignment for the benefit of its creditors before the filing of a petition in bankruptcy against one of the stockholders, and the latter's liability for the difference between the amount of his stock subscription and the value of property transferred in payment thereof had ceased to be contingent, although not yet liquidated, since the corporate debts for which a subscription would be a trust fund were then capable of determination, the receiver of the corporation can prove a claim for such liability against the bankrupt's estate. In re Thompson (D. C.) 257 Fed. 140, 42 Am. Bankr. Rep. 142.

[181] In re Wisconsin Engine Co., 234 Fed. 281, 148 C. C. A. 183, 37 Am. Bankr. Rep. 106; Crane v. Eastern Transp. Line, 48 Conn. 361. "We understand by liquidation an amount certain and fixed, either by the act and agreement of the parties or by operation of law—a sum which cannot be changed by the proof—it is so much or nothing—and that the term does not necessarily refer to a writing. An open account is the reverse of this." Nisbet v. Lawson, 1 Ga. 275, 287. A claim under an agreement by a bankrupt to pay an annuity to his divorced wife "during her life or until she remarries" is not a provable debt on account of the substantial impossibility of estimating the value of the contingency of a remarriage. Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[182] In re Erie Lumber Co. (D. C.) 150 Fed. 817, 17 Am. Bankr. Rep. 689. A claim against a bankrupt for breach of promise to marry, on which a suit is pending in a state court, is an unliq-

arising upon a written guaranty to pay the future indebtedness of another person upon an open account,[183] and the liability of a bankrupt broker for stock purchased by him for a customer and converted to his own use, the exact time of the conversion not being shown.[184] So where plaintiff was a partner with defendant in a transaction involving the purchase and sale of a certain commodity, and plaintiff knew, when defendant filed his petition in bankruptcy, that the venture would result in a loss, leaving the defendant indebted to him, though the exact amount was not then known and could not be ascertained until the rest of the stock on hand was disposed of, it was held that plaintiff had an "unliquidated claim" against defendant at the date of the bankruptcy.[185] In this classification also are included losses suffered by a broker in disposing of goods purchased for the bankrupt which he failed or refused to receive,[186] and a claim against a testamentary trustee for negligence and mismanagement.[187] But on the other hand, a claim against the estate of a bankrupt for sums of money obtained by him from the claimants, while in their employment, by means of forged indorsements, pilfering of cash, and inducing them to purchase stocks on false and fictitious orders, cannot be denied allowance, on the ground of its being an unliquidated demand, where the amounts taken from and paid out by the claimants are certain.[188]

When a creditor's claim against the bankrupt is unliquidated in this sense, he cannot at once proceed to make proof of it and have it allowed. He must first make an application to the court to have the claim "liquidated," and it will then be liquidated in such manner as the court shall direct,—or it must be liquidated by suit or in some other manner which the court will allow or accept, without a previous application to it,—and thereafter he may prove the claim in the manner prescribed by law, and secure its allowance for the amount fixed by such liquidation.[189] As the manner of liquidating a claim of this kind is left to the direction of the court, any kind of judicial investigation will be sufficient which results in establishing the validity of the claim and definitely fixing its amount, provided the court will direct or sanction it. Thus, the liquidation may be effected by a hearing before the referee, by a plenary suit

uidated claim, and the court may properly order it liquidated by trial in the state court. In re Martin, 228 Fed. 184, 142 C. C. A. 540, 35 Am. Bankr. Rep. 776.

[183] Hargroves v. Cooke, 15 Ga. 321.

[184] In re Graff, 117 Fed. 343, 8 Am. Bankr. Rep. 744.

[185] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

[186] In re Smith, 6 Ben. 187, Fed. Cas. No. 12,975.

[187] In re Griffin, 188 Fed. 389.

[188] In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835.

[189] In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83; In re Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113; In re Clough, 2 Ben. 508, 2 N. B. R. 151, Fed. Cas. No. 2,905.

in a court of competent jurisdiction, or by permitting an action pending in any court to proceed to judgment.[190] Hence where an action on an unliquidated claim is pending in a state court when bankruptcy occurs, and the trustee does not apply for a stay but permits the case to go to judgment, the claim is thereby liquidated, and the judgment affords proper proof of the amount of the claim.[191] And where a claim secured by a mortgage on the bankrupt's stock in trade was attacked by the trustee as a preference, and thereupon the creditor sued in a state court to establish the validity of his mortgage, and in that action the mortgage was held to be invalid as a preference, it was held that the creditor's claim was thereby "liquidated," and was provable as an unsecured claim.[192]

§ 501. Assigned Claims.—Where a provable claim against the bankrupt existed at the time the petition was filed, a subsequent assignment of it will carry with it all the rights and remedies which the assignor had, as to participating in the bankruptcy proceedings and receiving a share of the estate.[193] But, except in the case of negotiable paper, the assignee will take the claim in the same condition in which his assignor held it, and will acquire no stronger or higher rights.[194] He may, however, prove the claim for its full amount although he purchased it at a discount,[195] and he may prove the claim and receive dividends on it, notwithstanding that the assignment was intended only as collateral security.[196] But where various creditors have all assigned their claims to a committee, with a view to purchasing the bankrupt's property and selling it for the benefit of the assignors, the right to prove the claims in the bankruptcy is in the committee, and not in the individual creditors.[197] The form by which a claim against a bankrupt is transferred is immaterial, and cannot affect the right of the assignee to prove the claim, provided only that it is sufficient to estop the original holder from asserting any right to it.[198]

[190] In re Buchan's Soap Corp., 169 Fed. 1017, 22 Am. Bankr. Rep. 382; In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419; In re United Button Co., 140 Fed. 495, 15 Am. Bankr. Rep. 390.

[191] In re Buchan's Soap Corp., 169 Fed. 1017, 22 Am. Bankr. Rep. 382; Barry v. New York Holding & Construction Co., 229 Mass. 308, 118 N. E. 639.

[192] Powell v. Leavitt (C. C. A.) 150 Fed. 89.

[193] In re Fitzgerald, 191 Fed. 95, 26 Am. Bankr. Rep. 773; In re Breakwater Co. (D. C.) 232 Fed. 375, 36 Am. Bankr. Rep. 752.

[194] In re Wiener & Goodman Shoe Co., 96 Fed. 949; 3 Am. Bankr. Rep. 200; Humphreys v. Blight, 1 Wash. C. C. 44, Fed. Cas. No. 6,870.

[195] In re Houghton, 5 Law Rep. 321, Fed. Cas. No. 6,728.

[196] In re American Specialty Co. (C. C. A.) 191 Fed. 807, 27 Am. Bankr. Rep. 463. Compare In re Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733.

[197] In re E. T. Kenney Co., 136 Fed. 451, 14 Am. Bankr. Rep. 611.

[198] In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100.

But proof of an assigned claim may be defeated by evidence of a design to defraud other creditors or to defeat the operation of the bankruptcy act. It is not, indeed, unlawful to buy up claims against an insolvent person for the purpose of preventing or stopping proceedings in bankruptcy against him.[199] And it has even been held that the allowance of a claim, in favor of an assignee who acquired it after the adjudication, but from an innocent and bona fide holder in whose hands it was valid and provable, will not be set aside upon an allegation by other creditors that the assignee bought the claim for the purpose of acquiring a majority interest in the estate, of controlling the bankruptcy proceedings in the interest of the bankrupt and himself, and of hindering and defrauding the other creditors, when it does not appear that such fraudulent purpose has actually been carried out to the injury of other creditors.[200] But where a person intending to go into bankruptcy procured a friend to buy up a large part of his indebtedness at a small fraction of its nominal value, by disseminating false and discouraging statements as to the amount of dividends his estate would pay, it was remarked that no court of bankruptcy would hesitate to hold that claims thus tinctured with fraud should not be proven against the estate.[201] Yet, if the trustee has assets in hand more than sufficient to pay all other claims, debts purchased by agents for the bankrupt may be allowed to the extent of the sums paid therefor by the purchasers.[202]

§ 502. **Debts Payable in the Future.**—It is no objection to the proof and allowance of a claim that the time fixed for its payment, by the agreement of the parties or by the instrument which evidences it, has not arrived at the date of filing the petition in bankruptcy, provided that it was at that date a "fixed liability" and "absolutely owing."[203] But if the debt was not yet payable, at the commencement of the proceedings, and did not bear interest, the same clause of the statute requires that there shall be a "rebate of interest" upon it, which apparently means that the claim cannot be proved for its full amount, but must be discounted at the legal rate of interest, or that it can be proved only for its "present worth." To take the simplest form of illustration of the general rule, a promissory note made by the bankrupt is a provable debt in bankruptcy, although not due at the time of the filing of the petition but at a future day.[204] So in the case of an ordinary debt, if the debtor

[199] In re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519.

[200] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272.

[201] In re State Ins. Co., 16 Fed. 756.

[202] In re Lathrop, 5 Ben. 199, 5 N. B. R. 43, Fed. Cas. No. 8,104.

[203] Bankruptcy Act 1898, § 63a. See De Long v. Mechanics & Metals Nat. Bank, 168 App. Div. 525, 153 N. Y. Supp. 1010.

[204] In re Percy Ford Co., 199 Fed. 334, 28 Am. Bankr. Rep. 919.

has procured an extension of time for its payment, and becomes bankrupt, the creditor has a provable claim, even before the expiration of the time agreed on.[205] As to future accruing installments on a contract to pay an annuity, the law is not so clear. But the best present opinion appears to be that a penal bond, executed by a person who is thereafter adjudged a bankrupt, to secure the payment to the obligee of an annuity during life, is an instrument creating a fixed liability absolutely owing at the time of the filing of the petition, payable in the future, and is provable as a debt against the bankrupt's estate for the amount of the penalty stated therein, where the value of the annuity, computed on the life tables, exceeds such penalty.[206]

§ 503. **Interest Accrued and Accruing.**—Where a creditor's claim was "absolutely owing at the time of the filing of the petition" in bankruptcy, his proof of debt may include, and he should be allowed, "any interest thereon which would have been recoverable at that date."[207] And interest in the case of a debt put into judgment before the petition was filed may be proved with the debt.[208] But when the statute speaks of interest "recoverable" at the commencement of the proceedings, it evidently means that interest can be claimed and added to the debt only in cases where the parties have expressly agreed that the debt should bear interest, or where the debt is of such a character that it carries legal interest by force of law without the stipulation of the parties. Hence the creditor must show either a debt entitled to interest by operation of law, or else a mutual agreement of the parties that interest should be charged.[209] The right to claim interest in bankruptcy proceedings may also depend upon the making of a previous demand for payment.[210] And on the other hand, even though the parties may have agreed that no interest should be payable on a loan of money, yet where this stipulation was based on the performance of certain acts on the part

[205] Ecfort v. Greely, 6 N. B. R. 433, Fed. Cas. No. 4,260.

[206] Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, 6 Am. Bankr. Rep. 324 (overruling Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788); Haywood v. Shreve, 44 N. J. Law, 94; Roosevelt v. Mark, 6 Johns. Ch. (N. Y.) 266.

[207] Bankruptcy Act 1898, § 63a. See In re Orne, 1 Ben. 361, 1 N. B. R. 57, Fed. Cas. No. 10,581; J. & S. Ferguson v. Lyle, 267 Fed. 817, 45 Am. Bankr. Rep. 608; In re Mobile Chair Mfg. Co. (D. C.) 245 Fed. 211, 40 Am. Bankr. Rep. 134. The holder of tax certificates on mortgaged property belonging to an estate in bankruptcy is entitled to interest at the ordinary legal rate of 6 per cent. but not to the larger interest required by the local law to be paid on redemption from tax sales. Dayton v. Stanard, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, 37 Am. Bankr. Rep. 259; In re Clark Realty Co., 253 Fed. 938, 166 C. C. A. 38, 42 Am. Bankr. Rep. 403.

[208] Ex parte O'Neil, 1 Low. 163, Fed. Cas. No. 10,527.

[209] In re Stevens, 104 Fed. 323, 5 Am. Bankr. Rep. 9. See A. S. Coats Shingle Co. v. Chester Snow Log & Shingle Co., 106 Wash. 227, 179 Pac. 862.

[210] In re North Carolina Car Co., 127 Fed. 178, 11 Am. Bankr. Rep. 488.

of the borrower, his failure to observe the contract may entitle the lender to claim interest as against his estate in bankruptcy.[211] But it is said that interest should not be allowed where the debt is one which would have been barred by the statute of limitations if it had not been saved by a new promise.[212] And if, by the law of the state, the taking of usury causes a forfeiture of all interest, when the debt is put in suit, the same consequence attends the presentation in bankruptcy of a claim on which usury has been exacted.[213]

In the case of all ordinary debts, interest accruing subsequent to the time of the filing of the petition in bankruptcy is not provable.[214] But interest may run on a valid debt secured by a mortgage or other specific lien up to the time of its payment out of the proceeds of a sale of the property.[215] And in the unusual case where an estate in bankruptcy proves to be solvent, that is, where all proved claims are paid in full and there remains a balance in the hands of the trustee, the proving creditors are entitled to an additional allowance of interest, from the date of filing the petition to the date when the last payment on their debts was made, before any part of the surplus shall be returned to the bankrupt.[216]

§ 504. Costs, Expenses, and Collection Fees.—The statute provides for the proof and allowance of a claim for "taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt."[217] This will include costs incurred in an attachment proceeding prior to the filing of the petition in bankruptcy, though the lien of the attachment is dissolved by the adjudication in bankruptcy,[218] more especially, it appears, where the attachment proceedings had the effect of preserving the property for the benefit of the general creditors.[219] So also, costs incurred by a judgment creditor in obtaining the judgment and in defending an appeal therefrom are

[211] In re Fenn, 172 Fed. 620, 22 Am. Bankr. Rep. 833.

[212] In re Reed, 6 Biss. 250, 11 N. B. R. 94, Fed. Cas. No. 11,635.

[213] In re Prescott, 5 Biss. 523, 9 N. B. R. 385, Fed. Cas. No. 11,389.

[214] In re Haake, 2 Sawy. 231, 7 N. B. R. 61, Fed. Cas. No. 5,883; In re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2,115.

[215] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[216] Johnson v. Norris, 190 Fed. 459, 111 C. C. A. 291, 27 Am. Bankr. Rep. 107; In re John Osborn's Sons & Co., 177 Fed. 184, 100 C. C. A. 392, 24 Am. Bankr. Rep. 65; Bromley v. Goodere, 1 Atkyns, 75; Ex parte Mills, 2 Ves. Jr. 295; Clemons v. Clemons, 69 Vt. 545, 38 Atl. 314; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[217] Bankruptcy Act 1898, § 63a, clause 3. See Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4,960; In re Preston, 5 N. B. R. 293, Fed. Cas. No. 11,393.

[218] In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38; In re Preston, 5 N. B. R. 293, Fed. Cas. No. 11,393; In re Romm (D. C.) 235 Fed. 383, 37 Am. Bankr. Rep. 509. Compare In re Hatje, 6 Biss. 436, 12 N. B. R. 548, Fed. Cas. No. 6,215.

[219] In re Heller, 176 Fed. 656, 23 Am. Bankr. Rep. 792.

provable against the estate of the surety on the appeal bond.[220] And although the "costs" allowable are ordinarily only those taxable under the law of the state where the action was maintained, and must be limited to the amounts fixed by that law, yet it is competent for the parties to a litigation to stipulate for the payment to such officers as a referee or master in chancery, and also to a stenographer, of fees in excess of the statutory rate, and when they have done so, the amount agreed upon may be proved and allowed in bankruptcy.[221] But costs, to be allowable at all, must have been incurred in an action to recover a provable debt, and hence the costs of an attachment laid by the wife of the bankrupt in a libel for divorce are not provable in the bankruptcy.[222] And further, the costs must have been incurred "in good faith." But a creditor who sues, recovers judgment, and levies execution before the filing of the petition in bankruptcy cannot be charged with bad faith merely because he may have known or believed that the debtor was in financial straits when he began his suit.[223] But expenses and disbursements incurred by a creditor in endeavoring to defeat the bankruptcy act and to obtain a preference over other creditors cannot be allowed as a claim against the estate.[224] The question of the allowances to be made to an assignee for the benefit of creditors, including compensation for his own services, when the assignment is avoided by the adjudication of the assignor in bankruptcy, and the property turned over to the trustee, has been considered in an earlier section.[225]

Where the creditor's claim is based upon a note which contains a stipulation for the payment of an attorney's fee, in addition to principal and interest, in case the note is "placed in the hands of an attorney for collection," the right to add the attorney's fee to the amount of the claim, in proving it in bankruptcy will depend upon the concurrence of two things, the maturity of the note and the placing it in an attorney's hands for collection, both before the filing of the petition in bankruptcy. If the note fell due and was so placed for collection, and the bankruptcy of the maker occurred after both these events, then the creditor will be entitled to prove his claim for the stipulated attor-

[220] Coe v. Waters, 16 Colo. App. 311, 64 Pac. 1054.

[221] In re J. B. Brewster & Co., 180 Fed. 109, 103 C. C. A. 42, 24 Am. Bankr. Rep. 838.

[222] In re Foye, 2 Low. 399, Fed. Cas. No. 5,021.

[223] In re Harnden, 200 Fed. 172, 29 Am. Bankr. Rep. 504.

[224] In re Archenbrown, 8 N. B. R. 429, Fed. Cas. No. 503.

[225] Supra, § 444. And see Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254;. Bramble v. Brett, 230 Fed. 385, 144 C. C. A. 527, 36 Am. Bankr. Rep. 526; In re Sobol (D. C.) 230 Fed. 652, 35 Am. Bankr. Rep. 804; Hume v. Myers, 242 Fed. 827, 155 C. C. A. 415, 39 Am. Bankr. Rep. 401.

ney's fee in addition to the face of the note.[226] But if the note did not mature until after the institution of the bankruptcy proceedings, no such fee can be claimed, although it may have been given to an attorney for collection when due.[227] And on the other hand, although the note fell due before the filing of the petition in bankruptcy, yet if it was not placed in the hands of an attorney for collection until after the institution of the bankruptcy proceedings, the claim for an attorney's fee cannot be proved, because not a "fixed liability absolutely owing" at the commencement of the proceedings.[228] Further, where the law of the state regards a stipulation of this kind as merely a contract of indemnity,—that is, as creating a liability for reasonable fees for services rendered, not exceeding the amount stipulated,—a creditor will not be entitled to the allowance of such a fee unless he gives proof of collection services actually rendered and entitling him to indemnification.[229] Nor should an attorney's fee be allowed where the payee of the note, filing it for proof, is himself an attorney.[230] In the case of an attorney's fee stipulated for in a mortgage, its allowance or rejection in bankruptcy will depend upon the wording of the particular instrument.[231] Where the mortgagee proves his claim as a secured creditor, and the property is sold by the trustee in bankruptcy at private sale under orders of the court, a fee for the mortgagee's attorney cannot be claimed where the instrument only stipulated for such a fee in case it became "necessary to forclose" the mortgage "by suit or proceedings in court,"[232] but otherwise where it provided for an attorney's fee "in case legal services should become necessary to protect the interests" of the mortgagee.[233] Although a state statute provides that a mortgagee may recover attorneys' fees on foreclosure, provided he will previously give a certain notice of his intention to foreclose, yet such

[226] In re Edens Co., 151 Fed. 940, 18 Am. Bankr. Rep. 643; In re Ledbetter (D. C.) 267 Fed. 893, 45 Am. Bankr. Rep. 677. But see In re Mobile Chair Mfg. Co. (D. C.) 245 Fed. 211.

[227] In re T. H. Thompson Milling Co., 144 Fed. 314, 16 Am. Bankr. Rep. 454; In re Edens Co., 151 Fed. 940, 18 Am. Bankr. Rep. 643; In re Garlington, 115 Fed. 999, 8 Am. Bankr. Rep. 602. And see In re Harris (D. C.) 272 Fed. 351, 47 Am. Bankr. Rep. 40.

[228] In re Keeton, Stell & Co., 126 Fed. 426, 11 Am. Bankr. Rep. 367; In re V. & M. Lumber Co., 182 Fed. 231; In re Gebhard, 140 Fed. 571, 15 Am. Bankr. Rep. 381. Compare Merchants' Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299.

[229] McCabe v. Patton, 174 Fed. 217, 98 C. C. A. 225, 23 Am. Bankr. Rep. 335.

[230] In re Hersey (D. C.) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

[231] A claim for attorney's fees under a stipulation in a mortgage which was not due when the petition was filed, and under which no services had been rendered, is not allowable against the bankrupt's estate. British & American Mortgage Co. v. Stuart, 210 Fed. 425, 127 C. C. A. 157, 31 Am. Bankr. Rep. 465.

[232] In re Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369.

[233] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119.

fees do not constitute a provable claim in bankruptcy, where the bankruptcy of the mortgagor intervened after the giving of such notice, but before any foreclosure was had.[234]

As to the allowance of fees to the attorneys of creditors, independently of the agreement of the parties or of any statutory provisions, the rule is that such an allowance may be made on equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that such services were beneficial in fact.[235] Thus, attorneys who filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, a second petition presented by other creditors resulting in an adjudication, are not entitled to an allowance of fees from the estate.[236] So, where an adjudication of bankruptcy was made against a corporation which was already in the hands of a receiver appointed by a state court, and the attorneys for the receiver antagonized the bankruptcy proceedings and instigated litigation which delayed and obstructed such proceedings and caused a large amount of expense to the estate, it was held that they were not entitled to the allowance of any fees from the estate, and their belief that they were within their legal rights, and that the state court had prior jurisdiction of the case, was considered immaterial; and it was further held that they could not be allowed compensation for any services which were actually beneficial to the estate, where it appeared that, as a whole, their services cost the estate and the general creditors several times the amount, in increased expenses of administration.[237]

§ 505. Liability of Bankrupt as Indorser, Guarantor, or Surety.—The liability of a bankrupt as an indorser of commercial paper is undoubtedly a debt provable against his estate.[238] And where a note has matured at the time of the filing of the petition, and there have been presentation, demand of payment, and protest, the liability of an in-

[234] In re Weiland, 197 Fed. 116, 28 Am. Bankr. Rep. 620.

[235] In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646. See In re Crave & Martin Co., 183 Fed. 769, 106 C. C. A. 180; In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450; In re Coney Island Lumber Co., 199 Fed. 803. Where a receiver, appointed by a state court which was without jurisdiction to administer property of the bankrupt, performed valuable services in conserving the property, he may, on petition to the court of bankruptcy, be allowed compensation. State of Missouri v. Angle, 236 Fed. 644, 149 C. C. A. 640, 38 Am. Bankr. Rep. 394.

[236] In re Fischer (C. C. A.) 175 Fed. 531, 23 Am. Bankr. Rep. 427.

[237] In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646; In re M. Zier & Co., 127 Fed. 399, 11 Am. Bankr. Rep. 527.

[238] In re Letchworth, 19 Fed. 873; Hunt v. Taylor, 108 Mass. 508, 4 N. B. R. 683; In re Morse, 11 N. B. R. 482, Fed. Cas. No. 9,853; Ex parte Farnsworth, 1 Low. 497, Fed. Cas. No. 4,672; In re Henry & S. G. Lindeman (D. C.) 238 Fed. 639, 38 Am. Bankr. Rep. 390.

dorser thereon is a "fixed liability absolutely owing," within the meaning of the bankruptcy act.[239] But some of the cases have maintained that no provable claim on an indorsement can be said to have arisen unless dishonor, protest, and notice have preceded the institution of the proceedings in bankruptcy.[240] And in the case of a promissory note payable on demand, and which must therefore be presented for payment within a reasonable time in order to charge the indorser, it has been said that where such a note is not presented nor any demand made within four years, a protest made after that lapse of time does not fix any liability on the indorser, and a claim founded on the note cannot be proved against his estate in bankruptcy.[241] But these views have not the support of the weight of authority. The prevailing opinion is that the liability of a bankrupt indorser of negotiable paper, though it does not become absolute (by dishonor and protest) until after the filing of the petition, is nevertheless a "debt" within the meaning of the statute, which enumerates debts on contract, express or implied, among those provable in bankruptcy; and it may be proved against his estate after such liability has become fixed, if within the time limited for proving claims.[242] And it has even been held that the holder of a note might prove a claim against the estate of the bankrupt indorser, notwithstanding the fact that the note would not be due for more than a year after the adjudication in bankruptcy. "In this case, the claim must of course have been proved within the year, but its liquidation would be delayed until the security was all realized. This is a thing which may occur very frequently in bankruptcy."[243] Even where the note in question is rendered non-negotiable by the insertion of a restrictive provision in regard to the mode of its payment, a proof against the bankrupt as an indorser of it will not be expunged where it is shown that it was negotiated for his sole benefit.[244] But on the other hand, the bankrupt

[239] Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065.

[240] In re Loder, 4 Ben. 305, 4 N. B. R. 190, Fed. Cas. No. 8,457; In re Schaefer, 104 Fed. 973; Stowell v. Richardson, 3 Allen (Mass.) 64. Compare Ex parte Russell, 16 N. B. R. 476, Fed. Cas. No. 12,148. Notice of nonpayment of a note is not necessary to bind the estate in bankruptcy of an indorser where the estates of the maker and the indorser are both represented by the same trustees. In re T. A. McIntyre & Co., 198 Fed. 579, 28 Am. Bankr. Rep. 459.

[241] In re Crawford, 5 N. B. R. 301, Fed. Cas. No. 3,364.

[242] Moch v. Market Street Nat. Bank, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11; In re Phillip Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25; In re Smith, 146 Fed. 923, 17 Am. Bankr. Rep. 112; In re Gerson, 105 Fed. 891, 5 Am. Bankr. Rep. 89; McNeil v. Knott, 11 Ga. 142; In re Nickodemus, 3 N. B. R. 230, Fed. Cas. No. 10,254; Manheim v. Loewe, 185 App. Div. 601, 173 N. Y. Supp. 260.

[243] In re Buzzini & Co., 183 Fed. 827.

[244] In re Granger, 8 N. B. R. 30, Fed. Cas. No. 5,684.

cannot be held liable where it is shown that his indorsement on the note was forged and that he never received any benefit from the proceeds of it.[245]

The liability of the bankrupt as a surety on a replevin bond,[246] or on a bond of a guardian,[247] is also a provable claim. And under the act of 1867, which allowed proof of "contingent" claims, a claim was provable against the surety on any bond even before breach of condition.[248] But the present law is not construed as permitting proof of a claim against a surety until there has been an actual forfeiture or breach of condition or failure of performance, or (in the case of an indemnity bond) some actual loss or injury to the obligee.[249] So also in the case of a contract by which the bankrupt assumes the liability of a guarantor. If there is nothing presently due or capable of liquidation at the time of the bankruptcy, and no certainty that anything will ever be due or that any liability will ever arise, no claim can be proved against the bankrupt's estate.[250] It is the same with a contract of indemnity. Hence where, after the dissolution of a partnership, the bankrupt agreed with the claimant, his former partner, to pay the firm debts; which remained as joint obligations of both, the claimant cannot prove the amount of such debts against the estate in bankruptcy where he has paid none of them.[251]

§ 506. Rights of Bankrupt's Surety or Indorser.—A surety on a bond, who has made the payment or discharged the obligation for which the principal was liable, has a provable claim against the latter's estate in bankruptcy.[252] But a merely contingent or possible liability as surety is not provable. In other words, the bankrupt's surety has no provable claim, to be set up in his own name, until he has paid the debt or damages or liquidated the obligation called for by the bond.[253] And a partial

[245] In re Lamon, 171 Fed. 516, 22 Am. Bankr. Rep. 635.

[246] Choate v. Quinichett, 12 Heisk. (Tenn.) 427.

[247] Davis v. McCurdy, 50 Wis. 569, 7 N. W. 665.

[248] Jones v. Knox, 46 Ala. 53, 8 N. B. R. 559, 7 Am. Rep. 583.

[249] Loeser v. Alexander, 176 Fed. 265, 100 C. C. A. 89, 24 Am. Bankr. Rep. 75; Kingman v. Fowle, 5 Allen (Mass.) 133; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; Loring v. Kendall, 1 Gray (Mass.) 305.

[250] In re Merrill & Baker, 186 Fed. 312, 108 C. C. A. 390; In re Pettingill & Co., 137 Fed. 143, 14 Am. Bankr. Rep. 728. A note guaranteed by a corporation is provable against its estate in bankruptcy. In re Romadka Bros. Co. (D. C.) 206 Fed. 944.

[251] In re Tassinari (D. C.) 249 Fed. 990, 41 Am. Bankr. Rep. 148.

[252] In re Lyons Beet Sugar Refining Co., 192 Fed. 445, 27 Am. Bankr. Rep. 610; Liddell v. Wiswell, 59 Vt. 365, 8 Atl. 680; In re Halsey W. Kelley & Co., Inc. (D. C.) 215 Fed. 155.

[253] In re Astoroga Paper Co. (D. C.) 234 Fed. 792, 37 Am. Bankr. Rep. 751; Insley v. Garside, 121 Fed. 699, 58 C. C. A. 119, 10 Am. Bankr. Rep. 52; R. P. Williams & Co. v. United States Fidelity & Guaranty Co., 11 Ga. App. 635, 75 S. E. 1067; Hester v. Baldwin, 2 Woods, 433, Fed. Cas. No. 6,438; Steele v. Graves, 68

payment is not sufficient to give him a provable claim pro tanto. Unless and until the debt or claim is paid in full, the right to prove it as a debt in bankruptcy is in the original creditor and not in the surety.[254] But a surety need not necessarily pay in cash. If his individual note is expressly received and accepted in payment, he may then prove against the bankrupt principal.[255] But where the surety holds collateral securities, for his own indemnity, and pays the debt of the principal, he can prove only the difference between the debt and the amount realized on the securities.[256] But the bankruptcy act contains a provision that "whenever a creditor, whose claim against a bankrupt is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."[257] Of this provision it has been said: "No one has any rights under the bankruptcy law outside of what it gives him, and those of a surety are defined by this section, beyond which he cannot go. By it he has the right to prove, in case the principal creditor fails to do so. He does not, indeed, have to discharge the obligation in order to have this privilege, but in case he does do so, in whole or in part, he becomes entitled to that extent to the right of subrogation and, in any event, when he proves the debt, he proves it not in his own name, but in that of the original holder. The particular point to be noticed in the present connection with regard to the position of the surety is that he has only a right to prove in case the principal creditor fails to do so, and the latter cannot be said to fail until he has had an opportunity and passed it by, which can only occur when, by proceedings duly instituted, the estate of the debtor has been drawn into the bankruptcy court to be there administered, and all parties have been called upon to make known

Ala. 21; Ecker v. Bohn, 45 Md. 278, 16 N. B. R. 544. Compare Lipscomb v. Grace, 26 Ark. 231, 7 Am. Rep. 607. On this principle, a guarantor of rent cannot prove the amount of his contingent liability as a claim against the estate in bankruptcy, but may prove in the name of the lessor. In re Baker & Edwards (D. C.) 224 Fed. 611, 35 Am. Bankr. Rep. 469. But it seems that a surety on a bond to dissolve a garnishment, when judgment has been recovered against him subsequent to the bankruptcy, has a provable and allowable claim. Kilpatrick v. United States Fidelity & Guaranty Co., 228 Fed. 587, 143 C. C. A. 109, 37 Am. Bankr. Rep. 36.

[254] In re Heyman (D. C.) 95 Fed. 800, 2 Am. Bankr. Rep. 651; In re Hollister (D. C.) 3 Fed. 452; United States Fidelity & Guaranty Co. v. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. Supp. 92. See In re Blanchard (D. C.) 253 Fed. 758, 42 Am. Bankr. Rep. 177.

[255] In re Morrill, 2 Sawy. 356, Fed. Cas. No. 9,821.

[256] In re Baldwin, 19 N. B. R. 52, Fed. Cas. No. 796.

[257] Bankruptcy Act 1898, § 571. See J. S. Farming Co. v. Brannon (C. C. A.) 263 Fed. 891, 45 Am. Bankr. Rep. 425. The filing of his claim by the creditor does not prevent the surety from filing the claim, under this provision of the Bankruptcy Act, where the creditor's claim was withdrawn and he released all right to dividends. Kilpatrick v. United States Fidelity & Guaranty Co., 228 Fed. 587, 143 C. C. A. 109, 37 Am. Bankr. Rep. 36.

their claims. When that has been done, and he neglects to act, the surety, so as not to be prejudiced, may himself prove the debt in his stead. This, so far as I can see, is all the relief given by the act, and, whether adequate or inadequate, it must suffice. It follows from this that, at the outstart, the surety who has not taken up the obligation has no provable claim, and therefore has no standing to petition. It is not provided in the law that at that stage he can intervene, either in his own name or in the name of the creditor, and institute involuntary proceedings. All that he can do is to prove the claim later on if the creditor fails to do so, after somebody else has moved." [258]

On the same principle, an indorser of the bankrupt's paper may prove a claim for the amount, in his own name, against the estate, after he has paid the note, but not before.[259] Though such an indorser may have become absolutely liable to the holder of the note, by due notice of its dishonor, before the filing of the petition in bankruptcy, this does not make him a creditor of the bankrupt.[260] But it was held, under the former statute, that when the holder of a note fails to prove the same against the maker's estate, thus showing that he looks to the indorser alone for payment, the indorser may prove it and receive dividends, though he has not proved the note.[261] And apparently this course might be taken under that section of the present statute which was quoted above as applicable to the case of a surety.[262] Under a state statute providing that, where a party to a negotiable instrument has been adjudged bankrupt, notice may be given either to the party himself or to his trustee, and that notice of dishonor is not necessary where the drawer and drawee are the same person, or to an indorser where he is the person to whom an instrument is presented for payment, where the maker and indorser of

[258] Phillips v. Dreher Shoe Co., 112 Fed. 404, 7 Am. Bankr. Rep. 326. And see Insley v. Garside, 121 Fed. 699, 58 C. C. A. 119, 10 Am. Bankr. Rep. 52; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

[259] In re Salvator Brewing Co., 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Dr. Voorhees Awning Hood Co., 187 Fed. 611; In re Morse, 11 N. B. R. 482, Fed. Cas. No. 9,853; Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096. See In re Elletson Co., 193 Fed. 84, 28 Am. Bankr. Rep. 434. Where the holder of a note of the bankrupt has proved a claim upon it, and thereafter the indorser pays the note, he becomes subrogated to the rights of the claimant. In re Griffith Stillings Press (D. C.) 244 Fed. 315, 39 Am. Bankr. Rep. 813.

[260] In re Riker, 18 N. B. R. 393, Fed. Cas. No. 11,833.

[261] In re Ellerhorst, 5 N. B. R. 144, Fed. Cas. No. 4,381.

[262] Where the indorsers of notes of the bankrupt paid a portion of the debt and secured their release as indorsers, and the holders of the notes proved the notes for the entire amount against the bankrupt's estate, the indorsers were not entitled to prove the amount paid by them as claims against the estate, since under Bankruptcy Act, § 57i, they were only entitled to receive from the holders any overplus, after crediting dividends received from the bankrupt's estate and the amount paid by the indorsers. In re Manhattan Brush Mfg. Co. (D. C.) 209 Fed. 997, 31 Am. Bankr. Rep. 747.

notes were partners, and were adjudged bankrupts, both as partners and individually, before the notes matured, and the same trustees were appointed for all the estates, it was held that notice of non-payment on the maturity of the notes was not necessary to bind the estate of the indorser.[263]

§ 507. Rights of Creditor Where Several Parties are Liable.—The holder of a claim upon which several parties are personally liable may prove his claim against the estates of any of them who become bankrupt, and may at the same time pursue the others at law, and notwithstanding partial payments after the bankruptcy, received from the non-bankrupts or from the estates of those in bankruptcy, the creditor may recover dividends from each estate in bankruptcy upon the full amount of his claim, as it stood at the time the petition in bankruptcy was filed therein, until, from all sources he has received full payment of his claim.[264] Thus, the holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the acceptor, and the payee, and to receive dividends from all their estates until his debt is paid in full; and if only one of the parties is in bankruptcy, he may prove his claim against that one, and also proceed against the others at law.[265] So, when the holder of a note proves his debt in bankruptcy against the maker of the note for the full amount thereof, as an unsecured claim, this does not affect or release an indorser from his liability on the note.[266] But the estate of a bankrupt is entitled to the benefit of a partial payment of the debt made, before the bankruptcy, by any of the other parties liable for it, and in this case the creditor can prove against the bankrupt only the unpaid balance of his claim after crediting the payment.[267] An exception to this general rule, however, is found in the case where the maker of a note becomes bankrupt after the holder has received part payment from the indorser. Here, it is said, the creditor should prove a claim in the bankruptcy proceedings for the entire face of the note, be-

[263] In re T. A. McIntyre & Co., 198 Fed. 579, 28 Am. Bankr. Rep. 459.

[264] Board of Com'rs of Shawnee County v. Hurley, 169 Fed. 92, 94 C. C. A. 362, 22 Am. Bankr. Rep. 209; In re Simon, 197 Fed. 105, 28 Am. Bankr. Rep. 611; In re Girvin, 160 Fed. 206, 20 Am. Bankr. Rep. 320; Downing v. Traders' Bank, 2 Dill. 136, 11 N. B. R. 371, Fed. Cas. No. 4,046; In re Hicks, 19 N. B. R. 299, Fed. Cas. No. 6,456; In re Howard, 4 N. B. R. 571, Fed. Cas. No. 6,750. Where two bankrupt estates were liable for a debt due to a bank, the entire claim might be proven against both, and the fact that security not applied to the debt had been given by one bankrupt will not diminish the claim against the other. In re New York Commercial Co., 233 Fed. 906, 147 C. C. A. 580, 36 Am. Bankr. Rep. 769.

[265] In re Babcock, 3 Story, 393, Fed. Cas. No. 696.

[266] Merchants' Nat. Bank v. Comstock, 55 N. Y. 24, 14 Am. Rep. 168, 11 N. B. R. 235.

[267] In re Pulsifer, 14 Fed. 247; Ex parte Harris, 2 Low. 568, 16 N. B. R. 432, Fed. Cas. No. 6,109; In re Weeks, 8 Ben. 265, 13 N. B. R. 263, Fed. Cas. No. 17,349; Sohier v. Loring, 6 Cush. (Mass.) 537.

cause he is in the position of a trustee for the indorser, and if he receives, in dividends, more than enough to satisfy the unpaid balance of his claim, he will hold the surplus for the indorser, who will be entitled to reimbursement.[268] But in other cases, nothing short of actual payment, or a present right to receive a dividend from an estate in bankruptcy, will operate to prevent the creditor from proving in full against the estates of the other persons liable; the fact that one of the debtors, being in bankruptcy, has offered notes for composition payments will not have this effect.[269] So where a creditor, who had sold goods to the bankrupt, for which a third person became surety, afterwards received from the surety, as security, a note of the bankrupt arising upon a separate transaction, it was held that such note, being the property of the surety, did not inure to the bankrupt's interest, but to that of the surety, and was a separate debt, and that the creditor was entitled to prove on both claims.[270] But where a creditor of a bankrupt has a lien on the property of a third party, as part of the security for his debt, he cannot release his lien for a consideration without crediting the amount of the consideration on his claim.[271]

§ 508. **Claims of Bankrupt's Wife.**—In bankruptcy a wife may be a creditor of her husband, and may prove and sustain a claim against his estate for money which was her separate property, and which she loaned to him, intrusted to his keeping and management, or allowed him to use in his business, if it clearly appears that no gift was intended, but only a loan or trust.[272] And this rule applies notwithstanding the fact that the law of the particular state may not give to husband and wife any right to contract with each other or to sue each other, and for this reason an agreement to repay the wife's money could not be enforced by a suit at law. For in the first place, a proceeding in bankruptcy is not a suit against the bankrupt nor even adverse to him. And secondly, an express or implied undertaking to repay the wife's money, in the case supposed, is a contract which courts of equity will uphold and enforce, and courts of bankruptcy are governed by the principles of

[268] In re Souther, 2 Low, 320, 9 N. B. R. 502, Fed. Cas. No. 13,184; In re Ellerhorst, 5 N. B. R. 144, Fed. Cas. No. 4,381. And see In re Baxter, 18 N. B. R. 497, Fed. Cas. No. 1,120.

[269] In re Hicks, 19 N. B. R. 209, Fed. Cas. No. 6,456.

[270] In re H. V. Keep Shirt Co., 200 Fed. 80, 28 Am. Bankr. Rep. 765.

[271] Seay v. Wilson, 3 McCrary, 121, 9 Fed. 589.

[272] In re Remmerde, 206 Fed. 826, 30 Am. Bankr. Rep. 707; In re Nickerson, 116 Fed. 1003; In re Neiman, 109 Fed. 113; Tucker v. Curtin, 148 Fed. 929, 78 C. C. A. 557, 17 Am. Bankr. Rep. 354; Clark v. Hezekiah, 24 Fed. 663; In re Bigelow, 3 Ben. 198, 2 N. B. R. 556, Fed. Cas. No. 1,398; In re Blandin, 1 Low. 543, 5 N. B. R. 39, Fed. Cas. No. 1,527. The failure of a married woman to register a claim against her husband as her separate property, under the laws of Oregon, does not affect her right to prove the same against his estate in bankruptcy. In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100.

equity, and there is no distinction in such respect between an estate to the wife's separate use, as known to the chancery courts, and a separate estate created by statute.[273] But the wife's claim against her bankrupt husband must be supported, like any other, by a valid consideration, and she cannot prove a claim where she has already received satisfaction of the debt in the form of a conveyance of property,[274] or where she had no valid title to the property placed in her husband's hands, having previously received the same from him as a gift under circumstances which rendered the transfer invalid.[275] And where a wife allows her husband to appropriate the income of her separate estate in the support of the family, this does not create such a debt on his part as is provable in bankruptcy against his estate.[276]

Subject to the foregoing considerations, it may be stated as a general principle that the wife of a bankrupt is entitled to the allowance of a claim for money lent to her husband, which she procured by mortgaging her own realty,[277] or to prove a claim on a note given to her by the bankrupt, regardless of the consideration therefor, if it is not shown that the bankrupt was indebted at the time the note was made.[278] And under the civil law prevailing in Louisiana, a husband's debt to his wife for paraphernal property is provable against him in bankruptcy.[279] As to a wife's claim of payment for services rendered to her husband in his business, as, in the capacity of a clerk, bookkeeper, or the like, the law is not so clear. But apparently a claim may be proved in bankruptcy for the value of such services if the law of the state has removed the disabilities of married women,[280] but not where the common law in this respect still prevails.[281] Under a state statute providing that a wife who is granted a divorce from her husband shall be entitled to one-third of his personal property absolutely, the interest of a wife in the personal property of her husband, after the commencement of an action for divorce, but before decree is not such a claim as is provable against his estate in bankruptcy.[282]

[273] James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, 12 Am. Bankr. Rep. 573; In re Hill, 190 Fed. 390, 27 Am. Bankr. Rep. 146; In re Domenig, 128 Fed. 146, 11 Am. Bankr. Rep. 552; In re Nickerson, 116 Fed. 1003. Compare In re Talbot, 110 Fed. 924, 7 Am. Bankr. Rep. 29.

[274] In re Carpenter, 179 Fed. 743.

[275] In re Tucker, 148 Fed. 928, 17 Am. Bankr. Rep. 247.

[276] In re Jones, 6 Biss. 68, 9 N. B. R. 556, Fed. Cas. No. 7,444.

[277] In re Foss, 147 Fed. 790, 17 Am. Bankr. Rep. 439.

[278] In re Kyte, 164 Fed. 302, 21 Am. Bankr. Rep. 110. See In re Chapman, 105 Fed. 901, 5 Am. Bankr. Rep. 570.

[279] Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

[280] In re Domenig, 128 Fed. 146, 11 Am. Bankr. Rep. 552; In re Cox, 199 Fed. 952, 29 Am. Bankr. Rep. 456.

[281] In re Suckle, 176 Fed. 828, 23 Am. Bankr. Rep. 861; In re Winkels, 132 Fed. 590, 12 Am. Bankr. Rep. 696.

[282] Hawk v. Hawk, 102 Fed. 679, 4 Am. Bankr. Rep. 463.

§ 509. Claims for Alimony.—Notwithstanding some difference of opinion among the earlier cases decided under the present bankruptcy act, the rule is now well settled that alimony awarded to a divorced wife by the decree of a competent court does not constitute a debt or claim which is provable against the estate of the husband in bankruptcy, whether the claim be for arrears remaining unpaid at the date of the bankruptcy or for installments to accrue thereafter.[283] The reasons for this rule are thus explained by the United States Supreme Court: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of the court of one state, indeed, for the present payment of a definite sum of money as alimony is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction."[284] But where a wife, after securing a decree of divorce granting alimony, removes into another state, and there sues to recover unpaid arrears of alimony and obtains a judgment, and the

[283] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Hubbard, 98 Fed. 710, 3 Am. Bankr. Rep. 528; Turner v. Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Shepard, 97 Fed. 187; In re Anderson, 97 Fed. 321, 5 Am. Bankr. Rep. 858; In re Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837; In re Smith, 1 Nat. Bankr. News, 471; In re Lawrie, 2 Nat. Bankr. News, 77; In re Garrett, 2 Hughes, 235, 11 N. B. R. 493, Fed. Cas. No. 5,252; In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966; Beach v. Beach, 29 Hun (N. Y.) 181; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Welty v. Welty, 96 Ill. App. 141; Maisner v. Maisner, 62 App. Div. 286, 70 N. Y. Supp. 1107; Lemert v. Lemert, 25 Ohio Cir. Ct. Rep. 253; Brown v. Brown, 172 Ky. 754, 189 S. W. 921. Contra, In re Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; In re Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107; In re Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801; Arrington v. Arrington, 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769. Proceedings in a state court to enforce a decree awarding alimony, whether for installments past due or those to accrue in the future, against the bankrupt, will not be stayed or enjoined by the court of bankruptcy. Supra, § 189.

[284] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829.

husband lists the said judgment as an indebtedness in his schedules in bankruptcy, it constitutes a provable debt against his estate.[285]

§ 510. Unpaid Subscriptions to Stock and Stockholder's Statutory Liability.—The liability of a stockholder in a corporation to make good the difference between the face value of stock for which he has subscribed and the amount he has actually paid on it is a debt founded on contract, and is therefore provable against his estate in bankruptcy, at the instance of a judgment creditor of the corporation, although no assessment or call has yet been made by the corporation.[286] As to the last part of this rule, however, it must be admitted that the decisions are not entirely in harmony, as some courts have thought that such a liability could not be regarded as a provable debt until the corporation itself had been required to make the necessary assessment upon its stockholders, so that the extent of the liability of each might be thus determined.[287] But probably this might be dispensed with if it were shown that the corporation was so far insolvent that all the unpaid stock subscriptions, if collected and added to its present assets, would no more than pay the debts.

As to the liability imposed by statute upon the stockholders of certain classes of corporations to be personally answerable for the debts of their company to an extent proportioned to their holdings, even though their stock has been paid in full, it is generally held that this is not such a claim as can be proved in bankruptcy against a stockholder,[288] at least if his personal responsibility remains uncertain and contingent, or the amount for which he may become liable has not been ascertained,[289] but otherwise if it is liquidated and ascertained by a judgment or a decree in equity before the expiration of the time limited for proving debts,[290] or if the receiver of the corporation can certainly determine the amount of it by ascertaining the amount of the assets and

[285] In re Williams' Estate, 118 N. Y. Supp. 562.

[286] In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923; Carey v. Mayer, 79 Fed. 926, 25 C. C. A. 239; Glenn v. Abell, 39 Fed. 10; Marr v. Bank of West Tennessee, 4 Lea (Tenn.) 578. See In re Watkinson, 143 Fed. 602, 16 Am. Bankr. Rep. 245; In re Franklin Brewing Co. (C. C. A.) 272 Fed. 828, 46 Am. Bankr. 485.

[287] Gibson v. Lewis, 11 Phila. (Pa.) 476, 11 N. B. R. 247, Fed. Cas. No. 5,398; Sayre v. Glenn, 87 Ala. 631, 6 South. 45; Glenn v. Howard, 65 Md. 40, 3 Atl. 895. Receivers of an insolvent insurance company cannot prove a claim against the estate of a bankrupt subscriber to the stock of the company, where it does not appear that the subscription is necessary to pay the debts, or that in an equalization between stockholders the bankrupt would be in the debtor class instead of the creditor class. In re Bass (D. C.) 215 Fed. 275.

[288] James v. Atlantic Delaine Co., 11 N. B. R. 390, Fed. Cas. No. 7,179; Bristol v. Sanford, 12 Blatchf. 341, 13 N. B. R. 78, Fed. Cas. No. 1,893; Bangs v. Lincoln, 10 Gray (Mass.) 600.

[289] Irons v. Manufacturers' Nat. Bank, 27 Fed. 591.

[290] Garrett v. Sayles, 1 Fed. 371.

liabilities of the corporation, and thus determining how much will be needed from the stockholders to make up the deficiency of the assets of the corporation.[291]

§ 511. **Debts Created by Bankrupt's Fraud.**—Under the former bankruptcy law, it was held that a debt or liability created by the fraud of the bankrupt could be proved and allowed against his estate, notwithstanding the fact that it would not be released by his discharge, the result being that any dividend received on it would be merely a payment on account, leaving the bankrupt liable for the unpaid balance.[292] But under the present statute, the point is not free from doubt. It is true that the seventeenth section of the act provides that a discharge in bankruptcy shall release a bankrupt from "all of his provable debts, except such as * * * were created by his fraud," thereby implying that debts created by fraud are provable debts. But this must be read in connection with the explicit definitions of provable debts given in the sixty-third section, where there is nothing applicable to fraudulent debts save a provision for the proof of claims "founded upon an open account or upon a contract express or implied." Hence the true rule appears to be that a debt or liability is provable if essentially of a contractual character, though induced by fraud, or if the circumstances were such that the claimant might waive the tort and sue as upon an implied contract.[293] Thus, a claim arising out of the conversion by stockbrokers of shares purchased and held by them on a customer's account is provable on this theory,[294] and creditors in bankruptcy proceedings may invoke the principle that money procured by fraud may be recovered back by proving a demand for money had and received by the bankrupt to their use.[295] So, there is an obligation resting upon a defaulting testamentary trustee, independently of his bond, to restore the value of the assets embezzled, which is of a contractual character, and affords a basis for proof of a claim against his estate in bankruptcy therefor by his successor in the trust.[296] Again, where a bankrupt, who was in the em-

[291] Irons v. Manufacturers' Nat. Bank, 17 Fed. 308.

[292] In re Wright, 2 N. B. R. 41, Fed. Cas. No. 18,070; In re Rosenberg, 3 Ben. 14, 2 N. B. R. 236, Fed. Cas. No. 12,054; In re Rundle, 2 N. B. R. 113, Fed. Cas. No. 12,138; In re Clews, 19 N. B. R. 109, Fed. Cas. No. 2,891; In re Eureka Mfg. Co., 1 Low. 500, Fed. Cas. No. 4,550.

[293] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835; In re Schwartz, 14 Blatchf. 196, 15 N. B. R. 330, Fed. Cas. No. 12,502.

[294] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659.

[295] In re E. J. Arnold & Co., 133 Fed. 789, 13 Am. Bankr. Rep. 320. But a claim against a bankrupt for money received cannot be based on a check which was secured from the claimant by fraud and indorsed to the bankrupt, who was a bona fide purchaser for value without notice. In re United States Hair Co., 239 Fed. 703, 152 C. C. A. 537.

[296] Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413,

ploy of a firm of brokers, caused them to purchase stocks on false and fictitious orders purporting to have been given by customers, such purchases being in fact intended for his own benefit, the firm will have the right to treat him as the principal in the transactions, and to prove the debt against him in bankruptcy, as one for money paid at his request and for his use.[297] For similar reasons, a creditor who advanced money to the bankrupt on the strength of the latter's false and fraudulent representations concerning his credit or resources may prove a claim in bankruptcy for the amount, for though the loan was induced by fraud, there was none the less a contract for its repayment.[298] So where the creditor has by similar means been induced to part with goods, he may affirm the contract and file a claim for the value of the goods, instead of electing to claim for damages sustained by the fraud.[299]

§ 512. Taxes, and Interest and Penalties Thereon.—State and municipal taxes due from a bankrupt do not constitute a claim against his estate to be proved like those of creditors, and the rule that interest will not be allowed on debts after the filing of the petition has no application thereto, but it is the duty of the court of bankruptcy to direct the payment of such taxes, together with such penalties or interest as have accrued thereon under the laws of the state to the time of actual payment.[300] "Under the bankruptcy law, public taxes do not constitute a 'claim' in bankruptcy. It is not necessary for the public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors and no voice in the selection of a trustee, and the liability for taxes is in no way affected by the discharge of the bankrupt. On the other hand, the duty of affirmative action rests upon the court of bankruptcy. It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court, and thereupon it is the duty of the court to order their payment if there are sufficient funds in the estate for that purpose." [301] But taxes which have been actually paid, though irregularly, are not a liability of the estate in this sense nor a provable debt,[302]

affirmed, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953, 30 Am. Bankr. Rep. 39.

[297] In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835.

[298] In re E. J. Arnold & Co., 133 Fed. 789, 13 Am. Bankr. Rep. 320. Compare In re Schuchardt, 8 Ben. 585, 15 N. B. R. 161, Fed. Cas. No. 12,483.

[299] In re Hildebrant, 120 Fed. 992, 10 Am. Bankr. Rep. 184.

[300] In re Kallak, 147 Fed. 276, 17 Am. Bankr. Rep. 414; In re Scheidt Bros., 177 Fed. 599, 23 Am. Bankr. Rep. 778; In re Duryee, 2 Fed. 68; Warren R. Co. v. Belvidere, 35 N. J. Law, 584; Stanard v. Dayton, 220 Fed. 441, 137 C. C. A. 35, 33 Am. Bankr. Rep. 682; In re Wenatchee Heights Orchard Co. (D. C.) 212 Fed. 787, 32 Am. Bankr. Rep. 369; United States v. Brown-Alaska Co., 4 Alaska, 89.

[301] In re Kallak, 147 Fed. 276, 17 Am. Bankr. Rep. 414.

[302] City of Pittsburgh v. South Side Trust Co., 208 Fed. 984, 126 C. C. A. 72, 31 Am. Bankr. Rep. 897; See In re

as where the bankrupt, being a deputy tax collector, has settled with his principal for the taxes on his own property, though the latter remains personally liable for the amount to the municipality,[303] or where the taxes have been deducted from the value of property taken by creditors under attachments valid as against the trustee.[304] It is also to be noted that the provisions for the payment of taxes by the trustee in bankruptcy do not apply to an annual license fee imposed by the state law on corporations, which has been held by the courts of the state not to be a tax, but an arbitrary imposition laid on corporations as a condition of their continued existence; and neither is it a contractual obligation attaching by implication from the inception of the company, so as to be provable as a debt founded on contract, at least against the estate of a corporation becoming bankrupt before the fee for the year is assessed or collectible.[305]

A sale of real estate for delinquent taxes while the estate of the owner is in process of administration in the court of bankruptcy is irregular and invalid, at least if made without leave of the bankruptcy court; but if such a sale is made, the purchaser of the property is entitled to be reimbursed out of the general assets of the bankrupt on the surrender and cancellation of his certificate of purchase.[306]

When a claim for payment of a state tax is presented against an estate in bankruptcy, the court of bankruptcy has power to examine it and revise it, to determine the question of liability; but if the tax claimed is valid under the law of the state, the federal court cannot disallow it as unjust or unlawful.[307]

§ 513. Breaches of Real Covenants.—Under the bankruptcy acts of 1841 and 1867, there were several decisions to the effect that a claim for damages for the breach of covenants in a deed, such as those of warranty of title, of possession, and of quiet enjoyment, and against incumbrances, constituted a provable debt in bankruptcy.[308] This view was, however, controverted by authorities of perhaps quite equal force,[309] and in one of the cases it was pointed out that the covenants in a deed

Gracey (D. C.) 241 Fed. 981, 39 Am. Bankr. Rep. 463.

[303] Moore v. Green, 145 Fed. 480, 76 C. C. A. 250, 16 Am. Bankr. Rep. 607.

[304] Foster v. Inglee, 13 N. B. R. 239, Fed. Cas. No. 4,973.

[305] In re Danville Rolling Mill Co. (D. C.) 121 Fed. 432, 10 Am. Bankr. Rep. 327.

[306] Dayton v. Stanard, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, 37 Am. Bankr. Rep. 259; In re Clark Realty Co., 253 Fed. 938, 166 C. C. A. 38, 42 Am. Bankr. Rep. 403.

[307] In re United Five & Ten Cent Store (D. C.) 242 Fed. 1005, 40 Am. Bankr. Rep. 146.

[308] Parker v. Bradford, 45 Iowa, 311; Reed v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Abbott v. Rowan, 33 Ark. 593; Jemison v. Blowers, 5 Barb. (N. Y.) 686.

[309] Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52; Burrus v. Wilkinson, 31 Miss. 537; Magwire v. Riggin, 44 Mo. 512. See Bates v. West, 19 Ill. 134; Bailey v. Moore, 21 Ill. 165.

are not in the nature of an obligation to pay a debt, but amount merely to an undertaking to pay to the vendee whatever damages he may sustain by the property being taken from him under adverse claims, or subjected to prior incumbrances. The claim of the creditor, in such a case, it was thought, was purely one of damages, not reducible to any certain or specific amount, and which could not be ascertained but by the verdict of a jury, and hence not provable in bankruptcy.[310]

But since the present statute allows "unliquidated claims" to be proved, after they shall have been liquidated in such manner as the court shall direct, it appears that claims of this character may be provable in bankruptcy, provided, first, that the claimant shall have sustained actual loss or injury (not merely the apprehension of it) and second, that a breach of the covenant occurred before the filing of the petition in bankruptcy. The first point may be illustrated by the case of a sale of personal property which is fraudulent because in contravention of the rights of a prior mortgagee and therefore voidable. This will give the purchaser a right of action against the seller for breach of the implied warranty of title, but he has not a debt provable in bankruptcy against the seller until he has been damnified by losing the property to another.[311] As to the second point, if the breach of covenant occurred before the petition in bankruptcy was filed, then the claimant's damages were at that time capable of being liquidated and so made into a provable claim.[312] But debts, to be provable at all, must have existed at the time of the filing of the petition. And hence, for example, a lessee cannot prove a claim for damages for breach of a covenant for quiet enjoyment in the lease against the estate of his lessor in bankruptcy because of an eviction which did not take place until after the commencement of the proceedings in bankruptcy.[313]

§ 514. Claims for Torts.—Under the terms of the present bankruptcy act, a claim for damages for a tort, not connected with any contractual liability, and not reduced to judgment before the filing of the petition in bankruptcy, is not a provable debt.[314] Such a claim is not made provable by that clause of the act which provides that "unliquidated

[310] Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270.

[311] Bennett v. Bartlett, 6 Cush. (Mass.) 225.

[312] Merrill v. Schwartz, 68 Me. 514; Williams v. Harkins, 55 Ga. 172, 15 N. B. R. 34.

[313] In re Pennewell, 119 Fed. 139, 55 C. C. A. 571, 9 Am. Bankr. Rep. 490.

[314] Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. 135, 64 L. Ed. 247, 44 Am. Bankr. Rep. 547, 45 Am. Bankr. Rep. 599; Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565, affirming In re United Button Co., 140 Fed. 495, 15 Am. Bankr. Rep. 390; In re Bailey, 2 Woods, 222, Fed. Cas. No. 729; Bever v. Swecker, 138 Iowa, 721, 116 N. W. 704; Newman v. Goodard, 20 Hun (N. Y.) 563; Lomax v. Spear, 51 Ala. 532. Provability of claims for torts reduced to judgment before the filing of the petition, see supra, § 497.

claims" may be liquidated in such manner as the court shall direct and may thereafter be proved and allowed; for this relates only to a matter of procedure, and does not enlarge the class of claims provable under the preceding paragraph, and contemplates only the liquidation of claims founded on contracts or on open accounts.[315] Nor are the debts which may be proved in bankruptcy enlarged by the fact that it is assumed in the seventeenth section of the act (regulating the effect of a discharge) that liabilities for torts are provable and therefore released by a discharge, certain specified torts being thereupon excepted from the effect of a discharge. For this section, as originally enacted, referred only to judgments already recovered in actions for torts of the specified kinds, and was therefore not inconsistent with the sixty-third section of the statute, relating to provable debts. And the present want of harmony between the two sections is the result of the amendment of 1903, and therefore, in case of conflict, the sixty-third section, being specifically devoted to the enumeration and description of the classes of provable debts, must control.[316]

In accordance with these rules, a claim for unliquidated damages for negligence resulting in personal injuries is not a provable debt,[317] nor a cause of action for negligence causing the death of a human being,[318] or for negligence or nuisance resulting in injury to goods,[319] or for trespass to land,[320] or for deceit,[321] or for assault and battery and false imprisonment.[322] But in all those cases where the tort could be waived and a recovery had as upon a quasi contract, the claim may be provable, if the amount is definitely fixed, or after being liquidated as the court may direct.[323] On this principle, a claim for the conversion of personal property is a provable debt.[324]

[315] Supra, § 500. And see In re Hutchcraft (D. C.) 247 Fed. 187, 41 Am. Bankr. Rep. 238.

[316] Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 1 Am. Bankr. Rep. 565. See Biela v. Urbanczyk, 38 Tex. Civ. App. 213, 85 S. W. 451; Schall v. Camors, 251 U. S. 239, 10 Sup. Ct. 135, 64 L. Ed. 247, 44 Am. Bankr. Rep. 547, 45 Am. Bankr. Rep. 599.

[317] Imbriani v. Anderson, 76 N. H. 491, 84 Atl. 974.

[318] In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25.

[319] Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 1 Am. Bankr. Rep. 565; Dusar v. Murgatroyd, 1 Wash. (C. C.) 13, Fed. Cas. No. 4,199.

[320] Weisfield v. Beale, 231 Pa. 39, 79 Atl. 878; Kellogg v. Schuyler, Denio (N. Y.) 73; Gilman v. Cate, 63 N. H. 278.

[321] In re Schuchardt, 8 Ben. 585, 15 N. B. R. 161, Fed. Cas. No. 12,483.

[322] Beers v. Hanlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745; In re Hennocksburgh, 6 Ben. 150, 7 N. B. R. 37, Fed. Cas. No. 6,367.

[323] In re Griffin, 188 Fed. 389; In re Southern Steel Co., 183 Fed. 498, 25 Am. Bankr. Rep. 358; Burgoyne v. McKil-

[324] Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120; Weaver v. Voils, 68 Ind. 191; Cole v. Roach, 37 Tex. 413, 10 N. B. R. 288. A claim against a bailee for hire for the destruction of the goods bailed, though suable in either contract or tort, may be proved against the estate of the bailee in bankruptcy. Fingold v. Schacter, 223 Mass. 274, 111 N. E. 903.

§ 515. **Fines, Penalties, and Forfeitures.**—A judgment imposing a fine as a punishment for a crime or misdemeanor or any violation of a state statute is not a debt provable against the estate of the defendant in bankruptcy. Although it comes within the terms of that section of the bankruptcy law which defines provable debts (as being a "fixed liability evidenced by a judgment, absolutely owing"), if literally construed, yet it cannot be supposed to have been the intention of Congress that a discharge in bankruptcy should release a defendant from a fine imposed as a punishment for a criminal offense against the laws either of the United States or of a state, and that section should be construed as applying only to civil liabilities and claims.[325] To hold such a judgment provable as a debt, with the necessary consequence of its being released by the discharge, "would be allowing the national government, through its courts, to grant pardons for crimes committed against a state. A person convicted of manslaughter and sentenced to pay a fine of $1000 would be relieved, by a discharge in bankruptcy, from the punishment affixed by law to his crime. I do not think that the act, while it reasonably admits of any other construction, ought to be construed so as to permit or allow such a consequence."[326] For similar reasons, a judgment or sentence in a bastardy proceeding, condemning the defendant to pay a fixed sum for the maintenance of the child, is not a debt provable in bankruptcy.[327] And the liability of a bankrupt for the statutory penalty for cutting trees, imposed by a state statute, is not a debt founded on an implied contract, such as can be proved against his estate in bankruptcy.[328]

But there is another section of the bankruptcy law applicable, not

lip, 182 Fed. 452, 25 Am. Bankr. Rep. 387; Clingman v. Miller, 160 Fed. 326, 87 C. C. A. 278, 20 Am. Bankr. Rep. 360; In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835; In re Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715; First Nat. Bank of Enosburg Falls v. Bamforth, 90 Vt. 75, 96 Atl. 600; In re Schenderlein (D. C.) 268 Fed. 1018, 46 Am. Bankr. Rep. 128; Stalick v. Slack (C. C. A.) 269 Fed. 123, 46 Am. Bankr. Rep. 385. For an excellent discussion of the whole subject of waiving a tort and suing as upon a quasi contract, see Keener, Quasi Contracts, ch. III, pp. 159–312.

[325] In re Moore, 111 Fed. 145, 6 Am. Bankr. Rep. 590. Contra, In re Alderson, 98 Fed. 588, 3 Am. Bankr. Rep. 544. A fine imposed on the bankrupt by a state court, as a punishment for a civil contempt in disobeying its order, is not a provable debt. People v. Sheriff of Kings County, 206 Fed. 566, 31 Am. Bankr. Rep. 84. See In re Abramson, 210 Fed. 878, 127 C. C. A. 462, 32 Am. Bankr. Rep. 156. A fine adjudged against a corporation on its conviction for using the mails to promote a fraud, under U. S. Crim. Code, § 215, is a "penalty" within the meaning of the Bankruptcy Act, and not provable as a claim in bankruptcy; but the United States is entitled to prove all the costs which it paid or incurred in the prosecution as a pecuniary loss sustained by it. United States v. Birmingham Trust & Savings Co., 258 Fed. 562, 169 C. C. A. 502, 43 Am. Bankr. Rep. 430.

[326] In re Sutherland, Deady, 416, 3 N. B. R. 314, Fed. Cas. No. 13,639, per Deady, J.

[327] In re Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101; In re Cotton, Fed. Cas. No. 3,269; Hawes v. Cooksey, 13 Ohio, 242; Commonwealth v. Erisman, 21 Pittsb. Leg. J. O. S. (Pa.) 69.

[328] In re Southern Steel Co., 183 Fed. 498, 25 Am. Bankr. Rep. 358.

indeed to fines for criminal offenses, but to penalties and forfeitures incurred in civil cases. It provides that "debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." [329] Primarily this section would seem to apply to penalties imposed, in a fixed sum, without regard to the amount of damage involved, for breaches of contract between private individuals, on the one hand, and governmental or municipal authorities on the other hand, as, for example, a penalty of so many dollars a day for not completing a public work under contract within the time limited. But there are also cases where the mulct, although imposed as a punishment on an offender, is also intended as recompense to the public for injury to its property or revenues, and these cases would also come within the statute. For example, the laws of the United States impose, in certain cases, a "fine" for cutting timber on the public lands, the amount of which is to be "triple the value" of the timber cut. Here, it seems, the government might prove a claim for the whole amount of the penalty, especially if reduced to judgment, but it could be "allowed" only to the extent of the pecuniary loss sustained, that is, the single value of the timber. And the same principle would apply to the fines and penalties imposed under the internal revenue laws for failure to affix the proper stamps to various designated products.[330] Forfeitures are also imposed by the laws of the United States for various causes,—forfeitures of vessels for violations of the navigation laws and the neutrality laws, forfeitures of distilleries and apparatus for fraud in the evasion of the internal revenue laws, forfeitures of goods imported for non-payment of duties. In all such cases, it seems, the test of the applicability of this section of the bankruptcy law must be the sustaining of pecuniary loss by the government.[331] And a

[329] Bankruptcy Act 1898, § 57j.

[330] See In re Rosey, 6 Ben. 507, 8 N. B. R. 509, Fed. Cas. No. 12,066. In this case, under the act of 1867, the government had sued the bankrupt, and recovered a judgment against him, for penalties incurred for several violations of the stamp-tax law, in selling boxes of matches not stamped. The amount of the stamp required in each case was one cent. The amount of the penalty prescribed for each violation of the statute was $50. The judgment was for more than $5,000. The amount of the stamps required on the various boxes in question would have been about one dollar. Now if the "pecuniary loss sustained" was the value of the stamps which should have been affixed, it would follow, under the plain wording of the present statute, that the United States could prove its claim in such a case as this for the amount of the judgment, $5,000, but that the claim could be allowed only to the extent of one dollar. This looks like a legal absurdity, but it is the will of Congress expressed in plain terms.

[331] See In re Vetterlein, 13 Blatchf. 44, 12 N. B. R. 526, Fed. Cas. No. 16,929. In the case, under the bankruptcy act of 1867, before the commencement of the bankruptcy proceedings the United

claim of the United States on a forfeited recognizance for bail in a criminal case has been held to be a "penalty or forfeiture" within the meaning of this provision.[332]

What is here said of the United States government is also true, mutatis mutandis, of the states and of penalties and forfeitures for violations of municipal ordinances. Thus, the provision in question applies to a penalty imposed by the state law on a corporation for failure to report and pay the prescribed fee or bonus to the state on an increase of its capital stock.[333]

It is also necessary, in some cases, to consider the right of an informer to share in the penalty. But generally this is not a matter for the bankruptcy court at all. Where the government has recovered a judgment against the bankrupt for a penalty incurred by a violation of the revenue laws, for example, and has proved its claim as a creditor of the bankrupt, the informer by whose procurement the penal action was prosecuted has no right to come into the bankruptcy court with a petition asking for a summary adjudication of his right to a share of the penalty as against the United States. The court has no jurisdiction to effect such an adjustment in a proceeding in bankruptcy against the debtor. The claim of the informer is not against the bankrupt but against the government, and it must be worked out in the manner prescribed by the revenue laws, and not in a bankruptcy proceeding.[334]

§ 516. **Debts Barred by Limitations.**—A debt or claim, once valid and which otherwise would be provable in bankruptcy, but which is barred by the statute of limitations of the state in which the bankrupt resides and where the proceeding in bankruptcy is pending, at the time of the filing of the petition, cannot be proved or allowed,[335] notwithstanding the fact that it is not barred under the statute of some other state, as, for example, that in which the creditor resides or that in which both parties lived when the contract was made.[336] And the same rule applies

States brought an action against the bankrupts to recover the value of goods which had been forfeited for violation of the customs revenue laws. After the adjudication, the bankrupts admitted the right of the government to recover and a judgment was rendered. It was held that this was a provable debt.

[332] In re Caponigri, 193 Fed. 291, 27 Am. Bankr. Rep. 513.

[333] Commonwealth v. York Silk Mfg. Co., 192 Fed. 81, 112 C. C. A. 613, 27 Am. Bankr. Rep. 525.

[334] In re Jayne, 28 Fed. 419.

[335] In re Putman, 193 Fed. 464. 27 Am. Bankr. Rep. 923; Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223; In re Doty, 16 N. B. R. 202, Fed. Cas. No. 4,017; In re Kingsley, 1 Low. 216, 1 N. B. R. 329, Fed. Cas. No. 7,819; In re Hardin, 1 Hask. 163, 1 N. B. R. 395, Fed. Cas. No. 6,048; In re Reed, 6 Biss. 250, 11 N. B. R. 94, Fed. Cas. No. 11,635; In re Noeson, 6 Biss. 443, 11 N. B. R. 422, Fed. Cas. No. 10,288; In re Cornwall, 9 Blatchf. 114, 6 N. B. R. 305, Fed. Cas. No. 3,250; Ex parte Dewdney, 15 Ves. 479; Pace's Trustee v. Pace, 162 Ky. 457, 172 S. W. 925; In re Ballantine (D. C.) 232 Fed. 271, 37 Am. Bankr. Rep. 111.

[336] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; In re Res-

to a dormant judgment against the bankrupt; that is, a judgment is not a provable debt unless it has been kept alive in such manner as the law of the state prescribes, by suit or scire facias upon it, by the issue or levy of execution, or otherwise according to the local law, within the time limited by that law before the bankruptcy.[337] And the doctrine or rule of adverse possession may be invoked for a like purpose. Thus, an intervener who, with knowledge of facts and without any claim of ownership, allowed the bankrupt to hold exclusive possession of certain residence property and to make improvements, could not, after more than twenty years, contravene the lien of the trustee in behalf of the creditors, for whose debts the property was expressly or impliedly pledged, to his knowledge.[338]

A due and sufficient acknowledgment of a barred debt, or new promise to pay it, though made in contemplation of bankruptcy, is not necessarily a fraud on the other creditors, and will make the debt provable.[339] Thus, a partial payment on a debt barred by limitations will revive it to the extent of making it provable in bankruptcy, though it was made for that very purpose.[340] But if the law of the state makes any particular requirements as to what will be effective to take a note out of the statute of limitations, as that an extension of it must be in writing, signed by the maker, and containing an acknowledgment of the debt, these must be complied with or else the note will not be provable.[341] But if a debtor, within four months before the filing of his petition in bankruptcy, gives a bond and mortgage to a creditor whose claim is outlawed under the state statute of limitations, the bond will revive the debt, even though the mortgage is voidable as a preference.[342] But the mere fact that the bankrupt includes in his schedule of debts a claim already barred by the statute of limitations does not revive it so as to make it a provable claim against his estate, to the prejudice of his other creditors, but it is the duty

ler, 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Hardin, 1 Hask. 163, 1 N. B. R. 395, Fed. Cas. No. 6,048; In re Kingsley, 1 Low. 216, 1 N. B. R. 329, Fed. Cas. No. 7,819. But see a strong argument to the contrary of this view, in the case of In re Ray, 2 Ben. 53, 1 N. B. R. 203, Fed. Cas. No. 11,589, where it is said that the fact that the debt is barred by the statute of limitations of the state where the debtor resides is not enough to prevent its being proved in bankruptcy, because the effect of a state statute of limitations is merely to prevent the maintenance of a suit on the barred cause of action in the courts of that state; but the bankruptcy law extends throughout the United States, and its operation upon a particular debt or claim cannot be affected by anything less than an equally extensive impossibility of collecting such debt or claim by suit.

[337] In re Rebman, 150 Fed. 759, 80 C. C. A. 594, 17 Am. Bankr. Rep. 767; In re Farmer, 116 Fed. 763, 9 Am. Bankr. Rep. 19; In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Morris, Crabbe, 70, Fed. Cas. No. 9,825.

[338] In re Rawlins Mercantile Co. (D. C.) 251 Fed. 164.

[339] In re Blankenship (D. C.) 220 Fed. 395, 33 Am. Bankr. Rep. 756.

[340] In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270.

[341] Wood v. Ledgerwood, 210 Fed. 163, 127 C. C. A. 13.

[342] In re Stendts, 1 Nat. Bankr. News, 509.

of the trustee in bankruptcy to oppose the allowance of the claim, on the ground of limitations, in behalf of the creditors in general.[343] But it has been thought that this rule should not be invoked for the benefit of the bankrupt himself where no other creditor could be prejudiced by allowing the claim. If the estate proves sufficient to pay all the expenses of administration and all the other proved and allowed claims, the creditor whose debt was outlawed, but was included in the bankrupt's list of debts, should be entitled to satisfaction out of the surplus, because, as between the bankrupt and himself, the listing of the debt was a sufficient acknowledgment to take it out of the statute.[344] And a debt which was not barred by the statute of limitations at the time when the petition was filed will remain valid against the trustee throughout the bankruptcy proceedings, and will be provable at any time within a year after the adjudication, notwithstanding the whole term fixed by the statute of limitations has expired when the claim is offered for proof, for the institution of bankruptcy proceedings stops the running of the statute.[345]

§ 517. Claims Founded on Illegal or Immoral Consideration.—The bankruptcy act of 1867 expressly forbade the allowance of a claim in bankruptcy which was "founded in illegality." But this is only in affirmance of the common law,[346] since no court will lend its aid to the enforcement of an immoral or illegal contract. And although the present act contains no such express provision, it cannot be doubted that a claim arising on such a contract must be rejected.[347] Thus, a claim for money alleged to be due under a stock-gambling transaction, or other form of wagering contract, is not provable in bankruptcy,[348] although money placed in the bankrupt's hands for the purpose of being used in a gambling transaction, since it could be recovered in an action at law,

[343] In re Banks, 207 Fed. 662; In re Resler, 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Wooten, 118 Fed. 670, 9 Am. Bankr. Rep. 247; In re Kingsley, 1 Low. 216, 1 N. B. R. 329, Fed. Cas. No. 7,819; In re Ray, 2 Ben. 53, 1 N. B. R. 203, Fed. Cas. No. 11,589; In re Hardin, 1 Hask. 163, 1 N. B. R. 395, Fed. Cas. No. 6,048. Compare In re Hertzog, 18 N. B. R. 526, Fed. Cas. No. 6,433.

[344] In re Currier, 192 Fed. 695, 27 Am. Bankr. Rep. 597.

[345] In re McKinney, 15 Fed. 912; In re Graves, 9 Fed. 816; In re Wright, 6 Biss. 317, Fed. Cas. No. 18,068; In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; Wofford v. Unger, 53 Tex. 634; Minot v. Thacher, 7 Metc. (Mass.) 348, 41 Am. Dec. 444.

[346] In re Pittock, 2 Sawy. 416, 8 N. B. R. 78, Fed. Cas. No. 11,189.

[347] Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Bailey v. Milner, 1 Abb. U. S. 261, 1 N. B. R. 419, Fed. Cas. No. 740; Buckner v. Street, 1 Dill. 248, 7 N. B. R. 255, Fed. Cas. No. 2,098. A claim, the consideration for which was illicit sexual relations, is not provable. In re Wray, 233 Fed. 418, 147 C. C. A. 354, 37 Am. Bankr. Rep. 28.

[348] In re Ætna Cotton Mills, 171 Fed. 994, 22 Am. Bankr. Rep. 629; Hill v. Levy, 98 Fed. 94, 3 Am. Bankr. Rep. 374; In re Chandler, 9 N. B. R. 514, Fed. Cas. No. 2,590; In re Green, 7 Biss. 338, 15 N. B. R. 198, Fed. Cas. No. 5,751.

may likewise support a claim in bankruptcy.[349] And even if a contract to purchase stock was originally invalid as a gambling transaction on margins, in violation of a state statute, still the illegality cannot be asserted by the broker's trustee in bankruptcy against a claim by the purchaser, where the contract was executed by the broker purchasing the stock, and where he disposed of it without the claimant's knowledge or consent, and misappropriated the proceeds.[350] On similar principles, a claim founded upon a sale of intoxicating liquors, illegal and void under the laws of the state where made, is not provable in bankruptcy.[351] But a note which was given in part for a valid consideration, and in part for a consideration against public policy, if the two portions are distinguishable, may be proven in bankruptcy for so much as was originally valid.[352] Where the laws of the state provide for the forfeiture of the entire debt where it is tainted with usury, so that the creditor could not recover any portion of it by action in a state court, no part of such debt will be provable in bankruptcy, [353] and notes given by the bankrupt for the excess or bonus over the legal interest are not provable.[354] But if the statute merely provides for the forfeiture of all interest reserved, in case of usury, this will not prevent the proof and allowance of the principal sum.[355] But not every violation of a statute will necessarily render the party's debt or claim unenforceable in bankruptcy. The federal courts have always observed the distinction between acts mala in se and those merely mala prohibita, and it is a well settled rule that when a statute imposes specific penalties for its violation, the act concerned not being malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable.[356] This is the view which has been taken in bank-

[349] Streeter v. Lowe, 184 Fed. 263, 106 C. C. A. 405, 25 Am. Bankr. Rep. 774; In re E. J. Arnold & Co., 133 Fed. 789, 13 Am. Bankr. Rep. 320; Ex parte Young, 6 Biss. 53, Fed. Cas. No. 18,145.

[350] In re Dorr, 186 Fed. 276, 108 C. C. A. 322, 26 Am. Bankr. Rep. 408. And see In re Norris, 190 Fed. 101, 26 Am. Bankr. Rep. 945.

[351] Jacobs v. Ballantine Breweries Co., 193 Fed. 393, 113 C. C. A. 389, 27 Am. Bankr. Rep. 918; In re Town, 8 N. B. R. 38, Fed. Cas. No. 14,111; In re Paddock, 6 N. B. R. 132, Fed. Cas. No. 10,657. See Black, Intox. Liq. § 249. But a claim for the price of spirituous liquors lawfully sold in New York to a citizen of Maine, who intended them for sale in Maine in violation of law, is provable in bankruptcy in Maine, though it could not be recovered in the courts of that state. In re Murray, 1 Hask. 267, 3 N. B. R. 765, Fed. Cas. No. 9,954. And see Thompson, Belden & Co. v. Leisy Brewing Co., 249 Fed. 462, 161 C. C. A. 420, 41 Am. Bankr. Rep. 682.

[352] Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641.

[353] In re Pittock, 2 Sawy. 416, 8 N. B. R. 78, Fed. Cas. No. 11,189.

[354] Shaffer v. Fritchery, 4 N. B. R. 548, Fed. Cas. No. 12,697.

[355] National Exchange Bank v. Moore, 2 Bond, 170, 1 N. B. R. 470, Fed. Cas. No. 10,041.

[356] See In re Wylly (D. C.) 210 Fed. 954, 32 Am. Bankr. Rep. 145.

ruptcy of a statute providing that no property transported by a carrier shall be delivered except on surrender and cancellation of the bills of lading.[357] On the other hand, corporate bonds issued to a promoter, in violation of a state statute, are voluntary obligations not enforceable in bankruptcy to the prejudice of other actual creditors.[358]

§ 518. Ultra Vires and Unlawful Contracts of Corporations.—As a general rule, a claim is not provable in bankruptcy where either the bankrupt or the creditor is a corporation and the contract or transaction out of which the claim arose was beyond the lawful powers of the corporation. Thus, a corporation has no power to purchase its own stock, where the transaction will render it insolvent and so operate as a fraud on its creditors, and if this is done, notes given by it for the purchase price are invalid and cannot be proved against its estate in bankruptcy, at least in the hands of the selling stockholder.[359] So, a company chartered for the purpose of buying and selling building materials has no power to bind itself as guarantor for the performance of a building contract by another, and such a contract, being ultra vires and void, affords no basis for a claim against its estate in bankruptcy.[360] So where a savings bank, in violation of its charter, and the laws of the state, discounts notes of the bankrupt, neither the notes nor a claim for money loaned thereon can be proved.[361] The same rule applies where the charter of a manufacturing corporation limits the amount of indebtedness which it may lawfully incur to one-half the amount of its paid-up capital stock; debts contracted in excess of this limit are not provable.[362] And so, a claim cannot be proved in bankruptcy against a corporation on a note which it gave to cover the indebtedness of a third party, for which it was in no way responsible,[363] or on notes which were authorized by the stockholders, but which were issued by the managing officer direct to his personal creditors as collateral security for a prior indebtedness of his own.[364]

[357] In re T. H. Bunch Co., 180 Fed. 519.

[358] In re Wyoming Valley Ice Co., 153 Fed. 787.

[359] In re S. P. Smith Lumber Co., 132 Fed. 618, 13 Am. Bankr. Rep. 123, affirmed, Menefee v. Phelan, 140 Fed. 988, 72 C. C. A. 682; Keith v. Kilmer (C. C. A.) 261 Fed. 733, 9 A. L. R. 1287, 44 Am. Bankr. Rep. 304.

[360] In re S. P. Smith Lumber Co., 132 Fed. 620, 13 Am. Bankr. Rep. 118.

[361] In re Jaycox, 12 Blatchf. 209, 13 N. B. R. 122, Fed. Cas. No. 7,237. But the fact that a bank which lent money to a manufacturing corporation, taking secured notes therefor, made an ultra vires agreement to accept a share of the net profits of the business, but from which it received nothing, does not debar it from proving its notes against the corporation in bankruptcy. In re Machine Metals Producers Co., 251 Fed. 280, 163 C. C. A. 436, 41 Am. Bankr. Rep. 505.

[362] Cunningham v. German Insurance Bank, 101 Fed. 977, 4 Am. Bankr. Rep. 363.

[363] Mapes v. German Bank, 176 Fed. 89, 99 C. C. A. 609, 23 Am. Bankr. Rep. 713.

[364] American Woodworking Machinery Co. v. Norment (C. C. A.) 157 Fed. 801, 19 Am. Bankr. Rep. 679.

Again, where the law of a state forbids all foreign corporations to do business within its limits until they have complied with certain requisites (such as appointing a resident agent upon whom process may be served, or the like) a foreign corporation which has not complied with the statute has no power to make contracts or to bring suits within the state. Consequently a contract made by the corporation, under such circumstances, with a citizen of the state is illegal, and is not provable against the estate of such citizen in bankruptcy. As the bankrupt himself might have avoided it, his trustee may object to its being proved.[365] But the holder of special stock of a corporation, which was illegally issued, may prove against the estate of the corporation in insolvency (and presumably also in bankruptcy) a claim for the amount paid by him for the stock, deducting any dividends received, although he did not rescind the contract before the insolvency.[366]

§ 519. Landlord's Rights and Remedies.—Upon the bankruptcy of a tenant, his possession of the leased premises becomes the possession of the court of bankruptcy, and thereafter the rights and claims of the landlord must be worked out through the bankruptcy proceedings, and not by independent action.[367] So also the right of the bankrupt tenant to remove machinery or other fixtures from the building passes to his trustee in bankruptcy.[368] The landlord may prove a claim in bankruptcy for rent accrued up to the commencement of the proceedings, if he has a written lease or a valid oral agreement, or even an implied promise to pay rent,[369] and he may claim his rent out of the proceeds of goods which were specifically liable for it while on the demised premises and which have been sold by the trustee in bankruptcy,[370] or out of money paid to the tenant in eminent domain proceedings on the basis of his obligation to pay rent.[371] So also, the landlord may prove a claim for rent accruing during a period when the premises stood vacant, having been surrendered by the tenant, the latter having agreed to account for the rent until they were relet,[372] and where the original tenant assigned the lease or sublet the premises, the landlord, having agreed to the transfer, may prove his claim in bankruptcy against the estate of the assignee or sub-

[365] In re Comstock, 3 Sawy. 218, 11 N. B. R. 169, Fed. Cas. No. 3,078; In re Montello Brick Works, 174 Fed. 498, 23 Am. Bankr. Rep. 375; In re Springfield Realty Co. (D. C.) 257 Fed. 785, 44 Am. Bankr. Rep. 105.

[366] Reed v. Boston Machine Co., 141 Mass. 454, 5 N. E. 852.

[367] In re Steadman, 8 N. B. R. 319, Fed. Cas. No. 13,330.

[368] In re Breck, 8 Ben. 93, 12 N. B. R. 215, Fed. Cas. No. 1,822.

[369] In re Miller, 132 Fed. 414, 13 Am. Bankr. Rep. 87; In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940, 31 Am. Bankr. Rep. 769; In re Mullings Clothing Co. (D. C.) 230 Fed. 681, 37 Am. Bankr. Rep. 166.

[370] In re Bowne, 12 N. B. R. 529, Fed. Cas. No. 1,741.

[371] In re Clancy, 10 N. B. R. 215, Fed. Cas. No. 2,782.

[372] In re Bruce, 6 Ben. 515, Fed. Cas. No. 2,044.

lessee.[373] It is also competent for a landlord to require the tenant to pay current taxes on the leased premises, and municipal assessments, and water rates, and to stipulate that they shall constitute a part of the rent reserved, and when this is done, he may include the amount thereof, remaining unpaid at the date of the bankruptcy, in his claim against the estate of the bankrupt tenant.[374] But a state statute providing that, where a tenant unlawfully withholds possession of rented premises from his landlord, judgment shall go against such tenant "for double the rent reserved or stipulated to be paid," relates merely to the measure of the amount for which the tenant shall be liable, and does not characterize the landlord's demand for double rent during the period of unlawful detention as a debt springing out of the original contractual relation; and hence such demand, not arising ex contractu, is not provable in bankruptcy.[375] So again, where a lease provided that the tenant might make alterations in the premises, he agreeing to restore the property at the expiration of the lease to its former condition, and before the end of the term the tenant became bankrupt, and the landlord resumed possession of the premises and leased them to the trustee in bankruptcy, afterwards seeking to prove a claim against the estate for the estimated cost of restoring the property, it was held that the claim was not provable, as the clause in the lease contemplated the expiration of the lease by its own terms, and not by re-entry by the landlord.[376]

§ 520. Same; Landlord's Lien.—The general principles governing landlords' liens, in the bankruptcy of the tenant, have been discussed in an earlier section.[377] It remains to be stated that a landlord to whom rent is due for the use of the premises by the bankrupt will not be required to bring an action in a state court for the establishment of his lien, as provided by the state statute, as a condition precedent to the assertion of his rights against the bankrupt's property in the hands of

[373] Witherow v. South Side Trust Co., 181 Fed. 753; Wylie v. Smith, 2 Woods, 673, Fed. No. 18,110.

[374] Ellis v. Rafferty, 199 Fed. 80, 117 C. C. A. 592, 29 Am. Bankr. Rep. 192; McCann v. Evans, 185 Fed. 93, 107 C. C. A. 313, 26 Am. Bankr. Rep. 47; In re Criblier (D. C.) 184 Fed. 338, 25 Am. Bankr. Rep. 765. Where a lease required the bankrupt lessee to pay taxes two months after they became a lien on the premises, taxes which were assessed and became a lien prior to the tenant's bankruptcy were provable as a claim against the estate, though they were not in fact payable until after the adjudication. In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940, 31 Am. Bankr. Rep. 769. It seems that a landlord's claim for taxes and water rents which the tenant was bound to pay may be a provable debt though, at the time of the adjudication in bankruptcy, the amount had not been fixed by assessment. In re Spies-Alper Co. (D. C.) 231 Fed. 535, 36 Am. Bankr. Rep. 470.

[375] Hamilton v. McCroskey, 112 Ga. 651, 37 S. E. 859.

[376] In re Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246. And see In re O'Malley & Glynn, 191 Fed. 999, 27 Am. Bankr. Rep. 143.

[377] Supra, § 373.

the trustee, but he may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority of payment.[378] But under the laws of some of the states, a landlord who takes from his tenant a mortgage on the personalty used or kept on the demised premises, covering not only arrears of rent but also other debts, is deemed to have waived his statutory lien on such property for rent due, and he will not be entitled to enforce such a lien against the property in the hands of the tenant's trustee in bankruptcy.[379] Up to the time of the commencement of the proceedings in bankruptcy, the landlord may enforce his lien by distress, if allowed by the laws of the state, and the security thus acquired is not invalidated by the adjudication of the tenant in bankruptcy, though within four months thereafter.[380] But upon the filing of the petition in bankruptcy, the whole estate comes into the constructive custody and possession of the bankruptcy court, and thereafter the landlord will not be permitted to seize the goods on a distress warrant, but must proceed against the trustee in bankruptcy.[381]

§ 521. **Same; Rent to Accrue After Adjudication.**—A landlord cannot maintain a claim in bankruptcy against the estate of his tenant for any rent accruing or to accrue under the terms of the lease after the commencement of the proceedings in bankruptcy.[382] And it is im-

[378] In re Byrne, 97 Fed. 762, 3 Am. Bankr. Rep. 268.

[379] In re Wolf, 98 Fed. 74, 3 Am. Bankr. Rep. 558. See Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575.

[380] Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Goodwin v. Sharkey, 80 Pa. St. 149, 15 N. B. R. 526.

[381] In re Bishop, 153 Fed. 304, 18 Am. Bankr. Rep. 635; Buckey v. Snouffer, 10 Md. 149, 69 Am. Dec. 129; Noe v. Gibson, 7 Paige (N. Y.) 513.

[382] In re H. M. Lasker Co., 251 Fed. 53, 163 C. C. A. 303, 42 Am. Bankr. Rep. 234; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189; In re Gallacher Coal Co., 205 Fed. 183, 29 Am. Bankr. Rep. 766; South Side Trust Co. v. Watson, 200 Fed. 50, 118 C. C. A. 278, 29 Am. Bankr. Rep. 446; In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590; In re Scruggs, 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Quaker Drug Co., 204 Fed. 689, 30 Am. Bankr. Rep. 398; Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, 14 Am. Bankr. Rep. 453; In re Roth & Appel, 174 Fed. 64, 22 Am. Bankr. Rep. 504; In re Hays, Foster & Ward Co., 117 Fed. 879, 9 Am. Bankr. Rep. 144; Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Mahler, 105 Fed. 428, 5 Am. Bankr. Rep. 453; In re Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246; Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; Treadwell v. Marden, 123 Mass. 390, 25 Am. Rep. 108; Scott v. Demarest, 75 Misc. Rep. 289, 135 N. Y. Supp. 264; Kamioner v. Balkind, 93 Misc. Rep. 458, 158 N. Y. Supp. 310. As to special rules under the statutory law of Pennsylvania, see Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480.

material that the tenant may have given notes for the installments of rent to accrue in the future; they cannot be proved as debts against his estate.[383] As to the effect of a covenant in the lease that, on default in the payment of any installment of rent, the rent for the entire term shall at once become due and payable, there is more doubt. But it has been held that the bankruptcy of the lessee, while so in default, will give the landlord a right to prove a claim for the entire rent so far as it is definitely fixed by the terms of the lease,[384] though he must take the position of an ordinary general creditor, and will not be entitled to priority of payment,[385] but that if the tenant is not in default at the time of his bankruptcy, the filing of the petition will not cause the rent for the whole term to become exigible or mature notes given for future installments.[386] And a provision in the lease that, in case the tenant shall be adjudicated a bankrupt, the lessor may re-enter and terminate the lease, and that the lessee will then pay to the lessor "as damages" a sum representing the difference between the rental value of the premises and the rent reserved for the residue of the term, does not create a liability which can be proved as a debt against the estate.[387] So a state statute giving to the lessor a lien on the tenant's property on the premises, to secure the payment of one year's rent due or to become due, does not entitle the landlord, when the tenant becomes bankrupt during the term, to priority of payment out of his estate for a year's rent from the date of the adjudication.[388]

[383] Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Hays, Foster & Ward Co., 117 Fed. 879, 9 Am. Bankr. Rep. 144.

[384] In re Pittsburg Drug Co., 164 Fed. 482, 20 Am. Bankr. Rep. 227. Unaccrued rent under a lease of a store service apparatus may be provable in bankruptcy, where the apparatus was required to be specially adapted to the premises and could not be used again to advantage, and the parties have so provided in their contract. In re Caswell-Massey Co. (D. C.) 208 Fed. 571, 31 Am. Bankr. Rep. 426.

[385] In re Cronson, 1 Nat. Bankr. News, 474.

[386] Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Miller Bros. Grocery Co., 219 Fed. 851, 135 C. C. A. 521, L. R. A. 1916B, 1099, Ann. Cas. 1916A, 946, 33 Am. Bankr. Rep. 704. Where a lease to a bankrupt of a store service system for a term of 10 years provided that, on breach by the lessee or its bankruptcy, the lessor might enter and take possession of the property, which it did after the bankruptcy, a further provision that in such case the rent for the entire term should immediately become due and payable was held to create a penalty, and a claim therefor against the bankrupt estate was disallowed. In re Merwin & Willoughby Co. (D. C.) 206 Fed. 116, 30 Am. Bankr. Rep. 485.

[387] Slocum v. Soliday, 183 Fed. 410, 106 C. C. A. 56, 25 Am. Bankr. Rep. 460; In re Rhoads, 2 Nat. Bankr. News, 179. Compare In re Goldstein, 1 Nat. Bankr. News, 422. See In re Merwin & Willoughby Co., 206 Fed. 116, 30 Am. Bankr. Rep. 485.

[388] In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206.

§ 522. Same; Occupation and Use of Premises by Trustee.—Where there is a leasehold estate among the assets of the bankrupt, the trustee may accept it if it is salable and has a money value, but he is not bound to do so unless it appears to be for the interest of the creditors.[389] If he accepts the term, for the purpose of realizing its value as an asset, he is bound by the covenants of the lease, including that for the payment of rent at the stipulated rate.[390] But there must be some positive and unequivocal act of acceptance by the trustee before he will be held liable on the lease,[391] and he does not accept the premises and become responsible for the rent merely by leaving some goods there,[392] and occupation of the leased premises by the trustee independently of the lease, where he pays for such occupation, is not evidence of an election to accept the lease.[393]

But if the trustee, without accepting or assuming the lease (or holding over after the expiration of the bankrupt's term), continues to occupy and use the demised premises for purposes connected with the administration of the estate, the landlord will be entitled to compensation for the reasonable value of the use of the premises by the trustee, from the date of the filing of the petition in bankruptcy until the possession is surrendered to him.[394] In ordinary circumstances, this may be fairly measured by the rent which the bankrupt was paying, and compensation to the lessor will be allowed at the rate of the rent reserved in the lease, if this appears fair and reasonable to the court.[395] But this is not always the case. If the trustee continues to occupy and use the premises only for the purpose of storing the goods of the bankrupt therein until they can be sold, he should pay rent to the landlord only to the extent to which the estate in bankruptcy has been benefited by the use of the premises. That is, the landlord cannot recover the

[389] White v. Griffing, 44 Conn. 437. And see, supra, § 307.

[390] Ex parte Faxon, 1 Low. 404, 4 N. B. R. 32, Fed. Cas. No. 4,704; White v. Griffing, 44 Conn. 437.

[391] In re Washburn, 11 N. B. R. 66, Fed. Cas. No. 17,211.

[392] In re Yeaton, 1 Low. 420, Fed. Cas. No. 18,133.

[393] In re Ten Eyck, 7 N. B. R. 26, Fed. Cas. No. 13,829.

[394] In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590; In re Hunter, 151 Fed. 904, 18 Am. Bankr. Rep. 477; In re Hinckel Brewing Co., 123 Fed. 942, 10 Am. Bankr. Rep. 484; Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Chambers, 98 Fed. 865, 3 Am. Bankr. Rep. 537; In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re McGrath, 5 Ben. 183, 5 N. B. R. 254, Fed. Cas. No. 8,808; In re Walton, 1 N. B. R. 557, Fed. Cas. No. 17,131; In re Ives, 18 N. B. R. 28, Fed. Cas. No. 7,116; In re Metz, 6 Ben. 571, Fed. Cas. No. 9,509; In re Croney, 8 Ben. 64, Fed. Cas. No. 3,411; In re Hamburger, 12 N. B. R. 277, Fed. Cas. No. 5,975; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6,837. And see supra, §§ 211, 307.

[395] In re Breck, 8 Ben. 93, 12 N. B. R. 215, Fed. Cas. No. 1,822; In re Appold, 6 Phila. (Pa.) 469, 1 N. B. R. 621, Fed. Cas. No. 499; In re Cronson, 1 Nat. Bankr. News, 474.

amount which would be a proper rental for the premises if used as a place of business by a merchant in trade, but only what they were worth as a mere store-house.[396] And even to this extent, the trustee is chargeable only for the time he actually used the place,[397] and if he surrenders the keys immediately after he receives them, he incurs no liability for rent which accrued before he took possession.[398] And in a case where the premises had been used by the bankrupt for the purpose of storing his goods, under a lease, and the trustee knew nothing of the lease until two or three months after his appointment, when he was applied to for the rent, whereupon he denied his liability and removed the goods, it was held that, as he had not accepted the lease and in fact derived no benefit from the premises, he was not liable to the landlord for any sum.[399]

Whatever may be the sum to which the landlord is entitled for the use of his premises by the trustee, he is not required to prove it as a debt in the bankruptcy proceedings and share with other creditors. It should be settled by the court, paid as a part of the expenses of administering the estate, and entered as a credit item on the trustee's accounts.[400] And if the trustee has no cash in hand with which to pay the landlord's charges, he may be ordered to sell sufficient personal property for that purpose, and this will take precedence of the bankrupt's claim to have his exemptions set apart out of such personalty.[401]

§ 523. Same; Damages for Breach of Contract or Covenant.—The rule stated in a preceding section,[402] that a landlord cannot maintain a claim in bankruptcy against the estate of his tenant for any rent accruing or to accrue after the commencement of the proceedings in bankruptcy, has sometimes worked hardship, and landlords of bankrupt tenants have attempted to prove a claim for the rent which would have accrued under the lease during the remainder of the term, on the theory that such a sum was recoverable as damages for the tenant's breach of his contract or covenant to pay the stipulated rent. But such claims

[396] In re Fowler, 8 Ben. 421, Fed. Cas. No. 4,997; In re Lucius Hart Mfg. Co., 17 N. B. R. 459, Fed. Cas. No. 8,592; In re Wheeler, 18 N. B. R. 385, Fed. Cas. No. 17,490; In re Dunham, Fed. Cas. No. 4,145.

[397] In re Merrifield, 3 N. B. R. 98, Fed. Cas. No. 9,465. See Longstreth v. Pennock, 9 Phila. (Pa.) 394, 7 N. B. R. 449, Fed. Cas. No. 8,488.

[398] In re Criblier, 184 Fed. 338, 25 Am. Bankr. Rep. 765.

[399] In re Washburn, 11 N. B. R. 66, Fed. Cas. No. 17,211.

[400] In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Butler, 3 Pittsb. (Pa.) 369, 6 N. B. R. 501, Fed. Cas. No. 2,236; In re Webb, 6 N. B. R. 302, Fed. Cas. No. 17,315; In re Rose, 3 N. B. R. 265, Fed. Cas. No. 12,043; In re Hoagland, 18 N. B. R. 530, Fed. Cas. No. 6,545.

[401] In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730.

[402] Supra, § 521.

have generally been disallowed.[403] And the same rule is applied where the lease contains an express covenant that, upon the bankruptcy of the lessee, the lessor may terminate the lease and re-enter, and that the lessee shall thereupon be liable for all loss and damage sustained by the lessor on account of the premises remaining unlet or being let for the remainder of the term for a less rent than that reserved in the lease. A claim for the breach of such a covenant does not constitute a "fixed liability absolutely owing at the time of the filing of the petition in bankruptcy," but the liability is altogether contingent, because of the uncertainty as to whether the lessor will re-enter and terminate the lease, and, if he does, whether there will be any loss, and its amount; nor is such a claim provable as a debt "founded upon express contract," under the clause of the statute relating thereto, because this cannot be construed as permitting the proof of claims which are contingent both as to liability and amount at the commencement of the proceedings.[404] And for similar reasons it has been held that a claim for damages against a lessee for abandoning the premises, a dwelling house, so that it was wrongfully entered, and burned and destroyed, is not a provable claim in bankruptcy proceedings.[405]

In the case of the lease of machinery or similar property, the lessor may be entitled to prove a claim for damages for having it thrown back on his hands by the bankruptcy of the lessee. If such a lease provides, for instance, that it shall be terminated upon the bankruptcy of the lessee, and the lessee covenants to pay to the lessor, on breach or termination of the lease, certain sums to cover the cost of transportation of the machinery back to the lessor, an allowance for depreciation, and the expense of repairing it for the use of another lessee, these items will be provable as a claim against the estate of the lessee in bankruptcy.[406] But it has been held that a claim of the lessor of a coal

[403] In re Leslie & Griffith Co. (D. C.) 230 Fed. 465, 36 Am. Bankr. Rep. 744; Ratshesky v. Whiting, 251 Fed. 268, 163 C. C. A. 424, 41 Am. Bankr. Rep. 640; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453; In re Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246; Ex parte Houghton, 1 Low. 554, Fed. Cas. No. 6,725; In re Croney, 8 Ben. 64, Fed. Cas. No. 3,411; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6,837. Compare In re Caloris Mfg. Co., 179 Fed. 722, 24 Am. Bankr. Rep. 609; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189. And see In re Mullings Clothing Co. (D. C.) 252 Fed. 667, 41 Am. Bankr. Rep. 756.

[404] In re Shaffer (D. C.) 124 Fed. 111, 10 Am. Bankr. Rep. 633; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Ells (D. C.) 98 Fed. 967, 3 Am. Bankr. Rep. 564.

[405] Winfree v. Jones, 104 Va. 39, 51 S. E. 153, 1 L. R. A. (N. S.) 201.

[406] In re Desnoyers Shoe Co., 227 Fed. 401, 142 C. C. A. 97, 36 Am. Bankr. Rep. 51; In re D. C. Clark Shoe Co. (D. C.) 211 Fed. 341, 32 Am. Bankr. Rep. 238. Contra, see In re Jorolemon-Oliver Co., 213 Fed. 625, 130 C. C. A. 217.

mine for the cost of pumping the mine after abandonment of the lease, due to the bankruptcy of the lessee, in view of stipulations in the lease, was for a contingent liability, dependent on continuance of the term, and therefore not provable against the estate.[407]

[407] In re Gallacher Coal Co. (D. C.) 205 Fed. 183, 29 Am. Bankr. Rep. 766.

CHAPTER XXVI

PROOF AND ALLOWANCE OF CLAIMS

§ 524. Necessity of Proof.—There are certain things which a creditor of a bankrupt may do without proving his claim. He may, for example, procure an order for the examination of the bankrupt, when he desires by this means to discover whether it will be worth his while to prove his claim.[1] But if the creditor wishes to participate in the distribution of the bankrupt's estate, through and by means of the bankruptcy proceedings, it is absolutely necessary that he should establish his status and the validity and amount of his claim in the manner which the act prescribes.[2] A secured creditor, it is true, may prefer to rely upon his security and avoid the bankruptcy proceedings altogether, and he will not generally be interfered with by the court unless there is reason to think that something might be realized on the security for the benefit of the general creditors, if it were foreclosed by the trustee in bankruptcy.[3] And there are certain privileged claims which need not

[1] In re Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; In re Walker, 96 Fed. 550, 3 Am. Bankr. Rep. 35.

[2] In re Dunn Hardware & Furniture Co., 132 Fed. 719, 13 Am. Bankr. Rep. 147; In re Kilgerman (D. C.) 219 Fed. 758, 33 Am. Bankr. Rep. 608. Where all things necessary to bring a proposed composition before the court for confirmation have been done, the court cannot as a matter of law refuse confirmation on the objection of creditors whose claims, though mentioned in the schedules, have not been proved or allowed. In re French, 181 Fed. 583.

[3] Infra, § 566. And see In re Goldsmith, 118 Fed. 763, 9 Am. Bankr. Rep. 419; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76; In re Old Oregon Mfg. Co. (D. C.) 236 Fed. 804, 38 Am. Bankr. Rep. 409. A landlord, having a lien or charge for the

be proved, such as taxes. Of taxes it has been said: "The bankruptcy act evidently does not contemplate that they shall be proved like an ordinary debt, providing, as it does, that they shall be paid by the trustee on the order of the court, and that he shall have credit in his accounts upon filing the receipts of the proper officers therefor." [4] And while the lien of a judgment is not lost by failure to prove the claim in bankruptcy,[5] yet a judgment creditor cannot share in the distribution of the estate without doing so.[6]

And where formal proof of the debt is imperative, nothing can avail as a substitute for it. Thus, the finding, in a decree of adjudication in involuntary bankruptcy, that the petitioning creditor has a valid and provable claim to a certain amount, is not conclusive upon the trustee and creditors, so as to dispense with proof of the debt of that creditor, or to preclude questioning his right to participate in the distribution of the estate.[7] And a voluntary litigation against the trustee of a claim against the estate, resulting in a judgment against the trustee, does not create a preferred debt which can be enforced directly against the estate, but its only effect is to liquidate the claim, and the judgment must be proved.[8] Again, the statement of a debt in the schedule of the bankrupt is not a proof of it; it may be stated in fraud and may not exist, or the bankrupt may have made payments upon it or have counterclaims against it. The debt must be proved by the oath of the creditor as the law directs.[9] Furthermore, a creditor who proves his debt in bankruptcy must do so absolutely and according to the directions of the statute and the rules of the court; he will not be allowed to interpose any protest, qualification, or reservation.[10] It should be added that the ordinary proceedings upon the proof and allowance of the demands presented by creditors are a part of the entire proceeding in bankruptcy, and are not to be regarded as so many separate suits at law or in equity.[11]

rent due him on the property of his tenant at the time of the latter's bankruptcy, but the amount of which has not been adjudicated, must, in order to preserve his priority, establish his claim by proof, the same as other creditors. In re Hayward, 130 Fed. 720, 12 Am. Bankr. Rep. 264.

[4] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Harvey, 122 Fed. 745, 10 Am. Bankr. Rep. 567; Paine v. Archer, 233 Fed. 259, 147 C. C. A. 265, 37 Am. Bankr. Rep. 454.

[5] Cottrell v. Pierson, 12 Fed. 805.

[6] In re Rosenberg, 144 Fed. 442, 16 Am. Bankr. Rep. 465. Where a defendant in a judgment is adjudicated a bankrupt, and the plaintiff, with knowledge of the bankruptcy proceedings, fails to prove his judgment therein, he cannot afterwards set off his judgment against a judgment which the bankrupt had recovered against him prior to the bankruptcy proceedings. Shoemaker v. Hurwitz, 56 Pa. Super. Ct. 632.

[7] In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Cleveland Ins. Co., 22 Fed. 200.

[8] In re Havens, 182 Fed. 367, 25 Am. Bankr. Rep. 116.

[9] In re Davis, 2 N. B. R. 391, Fed. Cas. No. 3,618.

[10] Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210.

[11] Wiswall v. Campbell, 93 U. S. 347,

§ 525. Effect of Proof.—By proving his claim in bankruptcy a creditor submits the same to the jurisdiction of the court. If he is a nonresident, he will so far accept the jurisdiction of the court over him, by this course, that his obedience to its orders in the bankruptcy proceeding may be enforced by the power of striking out his claim;[12] and if an alien creditor voluntarily appears and proves his claim and receives a dividend thereon, he will be held thereby to have waived the exterritorial immunity from the operation of the bankruptcy law which otherwise would have saved him from the effect of the discharge granted to the bankrupt.[13] Again, the proof of a debt establishes the status of the claimant as a creditor of the bankrupt, connects him with the proceedings, and gives him the right to participate therein to the fullest extent allowed to creditors,[14] so that he may, for example, join in a call for a meeting of creditors,[15] or file charges against the trustee and ask for his removal.[16] Moreover, the proof establishes the validity and provable character of the claim, and its amount, and the right of the creditor to receive dividends thereon, in a manner which will be final and conclusive on all parties, unless an appeal is taken from the allowance of the claim or a motion for its re-examination shall be made and prevail.[17]

The bankruptcy act of 1867 provided that no creditor proving his debt or claim should be allowed to maintain any suit at law or in equity therefor against the bankrupt, but should be deemed to have waived all right of action and suit against him; and it was held that such implied waiver applied to all other courts, as well as the bankruptcy court, and that any suit thereafter commenced by such creditor against the bankrupt should be enjoined.[18] The present statute contains no such provision, although it allows pending suits against the bankrupt to be stayed until the question of his discharge is determined. But unless the creditor is thus controlled by the court, in the interest of the estate as a whole, the doctrine appears to prevail that the filing of a proof of his claim is not a waiver of his right of action on it in another court.[19] Certainly, it

23 L. Ed. 923; Maryman v. S. G. Dreyfus Co., 117 Ark. 17, 174 S. W. 549.

[12] In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956.

[13] Clay v. Smith, 3 Pet. 411, 7 L. Ed. 723.

[14] See In re Smith, 2 Ben. 113, 1 N. B. R. 243, Fed. Cas. No. 12,971; Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210; In re Baldwin, 6 Ben. 196, Fed. Cas. No. 795.

[15] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835.

[16] In re Roanoke Furnace Co., 152 Fed. 846, 18 Am. Bankr. Rep. 661.

[17] Sabin v. Larkin-Green Logging Co. (D. C.) 218 Fed. 984, 34 Am. Bankr. Rep. 210. See In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9,463; American Woolen Co. v. Samuelsohn, 226 N. Y. 61, 123 N. E. 154.

[18] In re Meyers, 2 Ben. 424, Fed. Cas. No. 9,518; Wilson v. Capuro, 41 Cal. 545; Burns v. Buricke (Ky.) 1 S. W. 821.

[19] Bay State Milling Co. v. Susman Feuer Co., 91 Conn. 482, 100 Atl. 19; Beyer v. Sadvoransky, 108 Misc. Rep. 463, 177 N. Y. Supp. 705; In re Buchan's Soap Corp., 169 Fed. 1017, 22 Am. Bankr. Rep. 382; Ringenoldus v. Abresch, 119 Wis.

does not preclude the creditor from proceeding independently against any other person who may be separately liable on the same demand, such as a surety,[20] or another partner in the same firm who is not in bankruptcy;[21] nor will it waive his right to assert and enforce a lien upon particular property,[22] or to claim securities held as collateral,[23] or to pursue an independent remedy given by the state law, as, by the arrest of the debtor in the case of a debt fraudulently contracted.[24] So, if the creditor holds a note containing a waiver of exemptions, his proving the note as an unsecured debt in the bankruptcy proceedings will not debar him from proceeding in a competent court to subject the exempt property to the satisfaction of the demand.[25] As to the specific case of goods obtained by false representations and not paid for, the creditor does not waive his right of action for damages by proving his claim in bankruptcy,[26] but, so far as the bankruptcy proceedings are concerned, he is put to his election either to confirm the sale and assume the position of a creditor for the price or to repudiate the sale and recover the goods; and having made his election, with knowledge of the facts, by proving his claim and voting as a creditor in the bankruptcy proceedings, he is concluded thereby, and cannot afterwards withdraw his claim and demand the goods.[27] On a similar principle, it has been held that where the princi-

410, 96 N. W. 817. See In re E. B. Havens & Co., 186 Fed. 583; Graves v. Neosho Falls Bank, 89 Kan. 179, 131 Pac. 146. Filing a claim in bankruptcy against an agent, without knowledge of an undisclosed principal, does not preclude an action against the latter. Sweeney v. Douglas Copper Co., 149 App. Div. 568, 134 N. Y. Supp. 247. Compare Commercial Bank of Boonville v. Central Nat. Bank (Mo. App.) 203 S. W. 662. After an adjudication of bankruptcy on the voluntary petition of the debtor, creditors who had previously filed an involuntary petition do not lose their right to attack a preferential transfer by filing their claims with the referee. International Silver Co. v. New York Jewelry Co., 238 Fed. 945, 147 C. C. A. 619, 37 Am. Bankr. Rep. 91.

[20] United States v. Schofield Co., 182 Fed. 240; Curtin v. Katchinski, 31 Cal. App. 768, 161 Pac. 764; Tutt v. Fighting Wolf Min. Co. (Mo. App.) 209 S. W. 304.

[21] Robinson v. First Nat. Bank, 98 Tex. 184, 82 S. W. 505.

[22] Coles County v. Haynes & Lyons, 134 Ill. App. 320; Sessler v. Paducah Distilleries Co., 168 Fed. 44, 21 Am. Bankr. Rep. 723; Horton v. Queens County Machinery Corp., 101 Misc. Rep. 31, 166 N. Y. Supp. 662; Joseph Nelson Supply Co. v. Leary, 49 Utah, 493, 164 Pac. 1047. But see Brown v. City Nat. Bank, 72 Misc. Rep. 201, 131 N. Y. Supp. 92.

[23] Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, 19 Am. Bankr. Rep. 710. But see First Nat. Bank v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092.

[24] In re Lewensohn, 104 Fed. 1006, 44 C. C. A. 309, affirming 99 Fed. 73, 3 Am. Bankr. Rep. 594.

[25] In re Loden, 184 Fed. 965, 25 Am. Bankr. Rep. 917; In re Meredith, 144 Fed. 230, 16 Am. Bankr. Rep. 331. See In re Strickland, 167 Fed. 867, 21 Am. Bankr. Rep. 734; Drees v. Armstrong, 180 Iowa, 29, 161 N. W. 40.

[26] Maxwell v. Martin, 130 App. Div. 80, 114 N. Y. Supp. 349; Standard Sewing Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711; Sanger Bros. v. Barrett (Tex. Civ. App.) 221 S. W. 1087; J. K. Orr Shoe Co. v. Upshaw & Powledge, 13 Ga. App. 501, 79 S. E. 362.

[27] Standard Varnish Works v. Haydock, 143 Fed. 318, 74 C. C. A. 456, 16 Am. Bankr. Rep. 286; Lynch v. Bronson (D. C.) 160 Fed. 139, 20 Am. Bankr. Rep.

pal of several joint wrongdoers has become bankrupt, and the creditor has proved his claim as upon an implied contract and received dividends, he cannot thereafter maintain an action in tort against those who assisted the principal in converting the property.[28] But this doctrine is not unquestioned. For instance, in an action against an agent for conversion for the unauthorized investment of plaintiff's funds in certain notes, it was held that the proving of such notes in bankruptcy against the estate of the maker, and the receipt of a dividend thereon, did not estop the plaintiff from proceeding with the action, but especially, in this case, where an order of the court in the case required the proving of the claim and directed that it should be without prejudice.[29] So, where a debtor, in pursuance of a scheme to defraud his creditors, conveyed land, took back a mortgage, and assigned the mortgage, it was considered that a creditor, by filing his proof of claim in the bankruptcy proceeding against the debtor, did not waive his right of action against the assignee of the mortgage for the fraud.[30] In another case, where a creditor of a partnership pledged notes to one of the partners for collection, and that partner, in violation of his agreement to pay the proceeds of the notes to the creditor, used the money to pay off other indebtedness, it was held that the creditor, by accepting a dividend in the bankruptcy proceedings against the partnership, did not waive his right of action against the partner for misappropriation.[31] If the bankrupt does not succeed in his application for a discharge, then a creditor who has proved his claim is remitted, as to any unpaid balance, to his former rights and remedies, and will not be estopped from pursuing any such remedy by the mere fact that he proved his claim and received a dividend in the bankruptcy proceedings.[32] Proof of a claim against a corporation in bankruptcy is not a bar to an action thereon against the stockholders.[33]

409; In re Kaplan & Myers (D. C.) 236 Fed. 260, 37 Am. Bankr. Rep. 630; Edwin Clapp & Son v. Knorr, 106 Kan. 733, 189 Pac. 936. But see, as to reserving a right to reclaim the goods, In re Kaplan & Myers, 241 Fed. 459, 154 C. C. A. 291, 39 Am. Bankr. Rep. 367. And see Smith v. Carukin, 259 Fed. 51, 170 C. C. A. 51, 44 Am. Bankr. Rep. 278.

[28] Shonkweiler v. Harrington, 102 Neb. 710, 169 N. W. 258. And see Werner v. Manson, 107 Misc. Rep. 76, 176 N. Y. Supp. 742.

[29] Parkerson v. Borst (C. C. A.) 264 Fed. 761, 45 Am. Bankr. Rep. 531.

[30] Jasper v. Rozinski, 228 N. Y. 349, 127 N. E. 189.

[31] Beal-Burrow Dry Goods Co. v. Talburt, 139 Ark. 113, 213 S. W. 20.

[32] Frey v. Torrey, 175 N. Y. 501, 67 N. E. 1082; Dingee v. Becker, 9 Phila. (Pa.) 196, 9 N. B. R. 508, Fed. Cas. No. 3,919; Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 53 N. Y. 123, 13 Am. Rep. 476, 10 N. B. R. 355; Hoyt v. Freel, 8 Abb. Prac. N. S. (N. Y.) 220, 4 N. B. R. 131; Valente v. Cosentino, 218 Mass. 125, 105 N. E. 551. But one whose claim has been proved against the estate of a bankrupt, and afterwards expunged, cannot thereafter prosecute it in a state court. Pease v. Bennett, 17 N. H. 124.

[33] Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532; Shellington v. Howland, 53 N. Y. 371; Hall v. Robertson, 213 Ill. App. 147. But see Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193, L. R. A. 1916C, 189.

§ 526. **Time of Making Proof.**—The statute declares that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or, if they are liquidated by litigation, and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment; provided that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer." [34] The cases cited in the margin will illustrate the meaning of the phrase "liquidated by litigation" in the above provision.[35] Specifically, it is held that the term "litigation" is not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but includes as well proceedings to ascertain the kind and character or validity of the claim,[36] and hence applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated, and thereafter attempts to prove as a general creditor.[37] In any case, therefore, where the creditor has a suit pending which will determine the validity, nature, and amount of his claim, he has the right to wait until the end of the litigation and then prove his claim, though more than a year from the date of the adjudication may then have elapsed.[38] In the words limiting the right of proof to a year after the "adjudication," this term, as elsewhere defined in the statute, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such

[34] Bankruptcy Act 1898, § 57n. Under this provision, claims liquidated by litigation can be filed no later than one year and ninety days after the adjudication. In re Edelen, 248 Fed. 580, 40 Am. Bankr. Rep. 834. A creditor is not chargeable with laches in proving his claim, where it is presented within the year allowed by the statute, unless the rights of others have been prejudiced by his delay. In re Dunlap Carpet Co. (D. C.) 206 Fed. 726, 30 Am. Bankr. Rep. 664. Failure of a landlord to present a claim for a lien for rent under Rev. Stat. Tex. art. 5490, until more than 30 days after the adjudication of the tenant as a bankrupt does not defeat his right. Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575.

[35] In re Clover Creamery Ass'n, 176 Fed. 907; 100 C. C. A. 377, 23 Am. Bankr. Rep. 884; Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43; In re Lyons Beet Sugar Refining Co., 192 Fed. 445, 27 Am. Bankr. Rep. 610; In re Clark, 176 Fed. 955, 24 Am. Bankr. Rep. 388; In re Coventry Evans Furniture Co., 171 Fed. 673, 22 Am. Bankr. Rep. 623; In re Fagan, 140 Fed. 758, 15 Am. Bankr. Rep. 520; In re E. O. Thompson's Sons, 123 Fed. 174, 10 Am. Bankr. Rep. 581; In re Landis, 156 Fed. 318, 19 Am. Bankr. Rep. 420; Moore v. Simms, 257 Fed. 540, 168 C. C. A. 524, 44 Am. Bankr. Rep. 19.

[36] In re Standard Telephone & Electric Co., 186 Fed. 586, 26 Am. Bankr. Rep. 601.

[37] In re Salvator Brewing Co., 188 Fed. 522, 26 Am. Bankr. Rep. 21; First Nat. Bank v. Cameron, 209 Fed. 611, 126 C. C. A. 433, 31 Am. Bankr. Rep. 209, 695.

[38] In re Baird, 154 Fed. 215, 18 Am. Bankr. Rep. 655; In re Keyes, 160 Fed. 763, 20 Am. Bankr. Rep. 183; Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43; In re Salvator Brewing Co., 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Venstrom, 205 Fed. 325, 30 Am. Bankr. Rep. 569; Platt v. Ives, 86 Conn. 690, 86 Atl. 579; In re Louis J. Bergdoll Motor Co., 233 Fed. 410, 147 C. C. A. 346, 37 Bankr. Rep. 501.

decree is finally confirmed.[39] This includes not only the case where an appeal from a decree of adjudication is "affirmed," but also where such an appeal is dismissed.[40] If the debt of the particular creditor was not scheduled in time for proof and allowance, it will not be affected by the discharge of the bankrupt, except when the creditor had notice or actual knowledge of the proceedings in bankruptcy.[41]

The generally accepted rule is that the bar of the statute, as to the time for proving claims, is absolute and prohibitive; that a creditor cannot be permitted under any circumstances whatever to come in for the purpose of making proof after the end of the year (except as specially stated in the statute), but forfeits all right in that behalf by delay; and that the court has no discretionary power to permit the filing of proofs after the end of the year, either nunc pro tunc or otherwise.[42] This rule is applied so strictly that it is held to make no difference that the particular claim was not scheduled and that the creditor had no notice of the proceedings,[43] or that, during the statutory year, the creditor was asserting and litigating the validity of a preference, and was thereby prevented from making his proof,[44] or that a composition had been effected,[45] or that the failure to make proof in due time was caused solely by accident and mistake,[46] or because the creditor was misled and omitted to prove his claim in consequence of the fraudulent concealment of assets by the bankrupt, who listed no property.[47] And a claim cannot be allowed, after the end of the year, under the guise

[39] Bankruptcy Act 1898, § 1, clause 2. Where an adjudication in bankruptcy was vacated and the proceedings dismissed, but the order of vacation was reversed on appeal, and pursuant to mandate the adjudication and proceedings were reinstated, it was held that the court had power to allow a year thereafter for filing claims. In re Malkan (D. C.) 265 Fed. 867, 45 Am. Bankr. Rep. 86.

[40] In re Lee, 171 Fed. 266, 22 Am. Bankr. Rep. 820.

[41] Bankruptcy Act 1898, § 17.

[42] In re Ingalls Bros., 137 Fed. 517, 70 C. C. A. 101, 13 Am. Bankr. Rep. 512; In re Blond, 188 Fed. 452; In re Peck, 168 Fed. 48, 21 Am. Bankr. Rep. 707; In re Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. Bankr. Rep. 71; Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Co-operative Knitting Mills, 202 Fed. 1016, 30 Am. Bankr. Rep. 181; In re Knosco, 208 Fed. 201; In re Thompson, 227 Fed. 981, 142 C. C. A. 439, 36 Am. Bankr. Rep. 190; In re Trion Mfg. Co. (D. C.) 224 Fed. 521, 35 Am. Bankr. Rep. 480; In re McCarthy Portable Elevator Co. (D. C.) 205 Fed. 986, 30 Am. Bankr. Rep. 247.

[43] Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577; In re Muskoka Lumber Co., 127 Fed. 886, 11 Am. Bankr. Rep. 761.

[44] In re Leibowitz, 108 Fed. 617, 6 Am. Bankr. Rep. 268; In re Kemper, 142 Fed. 210, 15 Am. Bankr. Rep. 675; In re Rhodes, 105 Fed. 231, 5 Am. Bankr. Rep. 197.

[45] In re Brown, 123 Fed. 336, 10 Am. Bankr. Rep. 588; In re Bickmore Shoe Co. (D. C.) 263 Fed. 926, 45 Am. Bankr. Rep. 24.

[46] In re Sanderson, 160 Fed. 278, 20 Am. Bankr. Rep. 396.

[47] In re Meyer, 181 Fed. 904, 25 Am. Bankr. Rep. 44; In re Peck, 161 Fed. 762, 20 Am. Bankr. Rep. 629; Chapman v. Whitsett, 236 Fed. 873, 150 C. C. A. 135, 38 Am. Bankr. Rep. 424.

of an amendment or substitute for a prior claim, filed in due time but afterwards withdrawn.[48]

But this severe rule has been felt to work hardship in numerous cases, and the courts have often attempted to mitigate it in favor of creditors who were not to blame for the delay. Thus, it has been held that the statute should not be so construed as to prevent proof of a valid claim after the expiration of the year, where objection is not made by any other creditor or by the trustee, but by the bankrupt alone, and the delay was caused by the latter's own fraud.[49] So where the peculiar circumstances of the case rendered it impossible to file the claim for proof within the limited time.[50] And it has been thought that where a preferred creditor is compelled to surrender a voidable preference, he should thereafter be allowed to prove his claim before the estate is finally settled, though more than a year after the adjudication.[51] And in a case where the bankruptcy court ordered a sale of the bankrupt's estate, on condition that the purchaser should pay to each unsecured creditor a specified per cent of his claim, and the purchaser paid the money to the receiver, who turned it over to the trustee, who declared a dividend to the unsecured creditors, but excluding one creditor on the ground that he had failed to prove his claim within the statutory time, it was held that the court must permit the filing nunc pro tunc of an amended formal proof of the claim.[52] Further, this limitation of time is not binding on the United States as a creditor,[53] nor does it apply to a claim of ownership of property adverse to the bankrupt and to his estate.[54] And as to specific claims to funds in the possession of the trustee, it is held that the court of bankruptcy may limit the time for claimants to prove their title to less than a year, provided that notice is given to them and a reasonable length of time accorded.[55]

The present bankruptcy statute also declares that if any creditors do not make proof of their claims until after dividends have been de-

[48] In re E. O. Thompson's Sons, 123 Fed. 174, 10 Am. Bankr. Rep. 581. But a claim the proof of which was defective because it lacked a statement of the official character of the officer signing the jurat, and was returned to the creditor's attorney for correction, was held properly allowed, though not redelivered to the referee for two years. In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428.

[49] In re Towne, 122 Fed. 313, 10 Am. Bankr. Rep. 284.

[50] In re Fagan, 140 Fed. 758, 15 Am. Bankr. Rep. 520.

[51] In re Otto F. Lange Co., 170 Fed. 114, 22 Am. Bankr. Rep. 414.

[52] In re Basha (C. C. A.) 200 Fed. 951, 29 Am. Bankr. Rep. 225.

[53] In re Stoever, 127 Fed. 394, 11 Am. Bankr. Rep. 345; United States v. Birmingham Trust & Savings Co., 258 Fed. 562, 169 C. C. A. 502, 43 Am. Bankr. Rep. 430.

[54] Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565.

[55] In re T. A. McIntyre & Co., 176 Fed. 552, 100 C. C. A. 140, 24 Am. Bankr. Rep. 4; In re Lathrop, Haskins & Co., 223 Fed. 912, 139 C. C. A. 392, 34 Am. Bankr. Rep. 739.

cleared and paid to the others, the right of such others shall not be affected thereby, but the late proving creditors are to receive dividends equal in amount to those already received by the other creditors, if the estate amounts to so much, before such other creditors are paid any further dividends.[56] The law plainly intends that the first proof of claims shall ordinarily take place at the first meeting of creditors. But it is held that creditors are entitled to prove their claims before the day of such first meeting, so as to make themselves parties to the proceeding and be entitled to an order for the examination of the bankrupt.[57] The presentation and delivery of proof of a claim to the trustee in bankruptcy, within the limited time, is a sufficient filing of it.[58] And where a creditor prosecutes a suit or petition against the trustee, and recovers judgment, his claim is so far before the court that it may be considered as "proved" for the purpose of saving the bar of the statute.[59] So, a claim duly proved within the year may be increased after that time where it is made necessary by a requirement that the creditor shall return preferences received as a condition to its allowance.[60] And where a claim against a bankrupt's estate was originally filed within the year, but was disallowed, and subsequent proceedings showed that it should have been filed for a larger amount, it was held that the amendment filed after the year had expired was not barred by the one-year limitation.[61] This limitation is restricted, according to its spirit and purpose, to claims which existed as such at the time of the adjudication, that is, claims which were then available against the bankrupt himself. It does not apply to expenses or liabilities incurred by the receiver or the trustee after the adjudication, such, for example, as a landlord's claim for rent of premises while they were occupied by the trustee.[62]

§ 527. **Persons Authorized to Prove.**—Any person being the lawful owner of a claim against the bankrupt may prove it against his estate, and the fact that another has previously filed a claim as a creditor on the same account does not prejudice his right to offer proof of it.[63] Where various claims of the same general order have been pooled or placed in the hands of a committee or a trustee, they may be proved

[56] William Openhym & Sons v. Blake, 157 Fed. 536, 19 Am. Bankr. Rep. 639; Bankruptcy Act 1898, § 65c. See In re Coulter (D. C.) 206 Fed. 906, 30 Am. Bankr. Rep. 75.

[57] In re Patterson, 1 Ben. 448, 1 N. B. R. 100, Fed. Cas. No. 10,814.

[58] J. B. Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, 17 Am. Bankr. Rep. 72; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247.

[59] Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20; In re Strobel, 163 Fed. 787, 20 Am. Bankr. Rep. 884.

[60] In re Shiebler, 165 Fed. 363, 21 Am. Bankr. Rep. 309.

[61] In re Hamilton Automobile Co., 209 Fed. 596, 126 C. C. A. 418, 31 Am. Bankr. Rep. 205.

[62] In re Green (D. C.) 231 Fed. 253, 36 Am. Bankr. Rep. 188.

[63] In re James Dunlap Carpet Co., 171 Fed. 532, 22 Am. Bankr. Rep. 788; In re Dunlap Carpet Co., 206 Fed. 726, 30 Am. Bankr. Rep. 664.

by such representative,[64] but the fact that a series of bonds issued by the bankrupt corporation are secured by a mortgage to a trustee does not exclude the right of individual bondholders to prove their several claims.[65] Where the creditor has become bankrupt, his trustee in bankruptcy is the proper person to prove the claim against the debtor's estate.[66] There are also cases where two or more creditors may join as provants or petitioners, as where joint indorsers of the bankrupt's note have taken it up, each advancing half the necessary funds.[67] There is no reason why a county or other municipal corporation should not file and prove a claim against an estate in bankruptcy.[68] But a creditor whose claim is one for unliquidated damages should first make application to the court to direct the manner in which it shall be liquidated, and when that is done, he may file and prove his claim.[69]

In case the creditor is a partnership, either of the partners may prove the claim in the manner provided by law. It is only necessary that the deposition proving the debt should contain a sworn statement that the deponent is a member of the firm, with such slight changes of phraseology as are rendered necessary by the circumstances.[70] When the debt is due to a corporation, the rule is that "the deposition shall be made by the treasurer, or if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer." [71] But it is held, on the broad general principle that any person who is authorized to give an acquittance of a debt is entitled to prove that debt in bankruptcy, that a receiver appointed to take charge of a corporation upon its dissolution, or upon proceedings in bankruptcy or insolvency against it, in either a state or federal court, may properly make proof of a debt due to such corporation from a bankrupt debtor.[72] The fact that the

[64] In re Salvator Brewing Co., 188 Fed. 522, 26 Am. Bankr. Rep. 21; In re E. T. Kenney Co., 136 Fed. 451, 14 Am. Bankr. Rep. 611.

[65] Mackay v. Randolph Macon Coal Co., 178 Fed. 881, 102 C. C. A. 115, 24 Am. Bankr. Rep. 719. See In re A. J. Ellis, Inc., 252 Fed. 483, 164 C. C. A. 399, 42 Am. Bankr. Rep. 387.

[66] Bankruptcy Act 1898, § 57m.

[67] In re Farmers' Supply Co., 170 Fed. 502, 22 Am. Bankr. Rep. 460.

[68] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

[69] In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83.

[70] General Order No. 21, clause 1; Form No. 24. Where a partnership is in bankruptcy, the firm may prove against an individual partner and vice versa. Bankruptcy Act 1898, § 5g.

[71] General Order No. 21, clause 1. This order was amended, Nov. 1, 1915, by adding this provision: "If the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts." As to proof by the president of a corporation, who performs the ordinary duties of a treasurer, see In re Eisenberg (D. C.) 251 Fed. 427, 40 Am. Bankr. Rep. 864.

[72] Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364; In re Republic Ins. Co., 8 N. B. R. 197, Fed. Cas. No. 11,705; In re Baxter, 18 N. B. R. 560, Fed. Cas. No. 1,121; Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

president of a corporation has ceased to be a stockholder cannot be raised as an objection to proof of a claim by him in favor of the corporation against his estate in bankruptcy.[73] If the claim to be proved is due to a state, the proof should be made by the state treasurer or by some officer holding a relation to the state government similar to that which a treasurer or cashier bears to a business corporation of which he is such officer.[74] Proof of claim for wages of labor due to a minor is properly made by his father, at least if there is nothing to show emancipation.[75] And one of two or more executors may sign and verify a claim on behalf of the estate.[76]

§ 528. **Proof by Agent or Attorney.**—The present bankruptcy act provides that a proof of claim shall be "signed by a creditor"; but then, another clause provides that the term "creditor" may include "his duly authorized agent, attorney, or proxy." [77] And although the official form (No. 35) provided for the proof of a claim by agent or attorney requires the deponent to state the reason why the deposition "can not" be made by the claimant in person, yet the General Order (No. 21) which is of higher authority than the form, is fully satisfied if the deposition sets forth the reason why it "is not" made by the claimant in person. Upon the whole, therefore, we conclude that if there is any good reason for the proof being made by an agent or attorney it may be so made, notwithstanding it would not have been entirely impossible for the claimant to make the proof in person.[78] Thus, as held in some of the cases under the former statute, where the creditor himself has no personal knowledge of the facts respecting the debt, proof may be made by an agent who has had exclusive charge and control of the same, and who has personal knowledge of all the facts required to be sworn to in making the proof.[79] Authority to prove a debt in bankruptcy proceedings in behalf of the creditor may be conferred by a formal power of attorney, which must be "proved and acknowledged before a referee, or a United States commissioner or a notary public." [80] But if the creditor, at the time of making

[73] In re Morgan, 8 Ben. 186, Fed. Cas. No. 9,797.

[74] In re Corn Exchange Bank, 15 N. B. R. 216, Fed. Cas. No. 3,243.

[75] In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428.

[76] In re Schaffner (C. C. A.) 267 Fed. 977, 45 Am. Bankr. Rep. 681.

[77] Compare Bankruptcy Act 1898, § 57, with Id., § 1, cl. 9.

[78] While the statute allows proof of claim to be made by an agent, it is not contemplated that proof of claim can be so made when the principal is present and able to file his own proof. And a claim will be disallowed where the proof is made by an agent as the principal, without disclosing the agency, for it is in that case false. In re Collins (D. C.) 235 Fed. 937, 37 Am. Bankr. Rep. 692.

[79] In re Watrous, 14 N. B. R. 258, Fed. Cas. No. 12,270.

[80] General Order No. 21, par. 5. Under the former statute, a power of attorney to prove a debt in bankruptcy was not required to be acknowledged. In re Barnes, 1 Low. 560, Fed. Cas. No. 1,012; In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183. An attorney in fact may prepare and present

the power of attorney, is in a foreign country, the instrument may be acknowledged before a United States consul in such country.[81] It is also held that a power of attorney duly executed to either of three persons as substitutes, but acknowledged before one of them, though void as to that one, may lawfully be executed by either of the other two.[82]

Guardians, executors, administrators, and all other persons acting in a representative capacity, may make proof in bankruptcy of the claims of the persons or estates represented by them.[83] But it seems that the bankrupt himself cannot act as the trustee or representative of a creditor in proving the latter's claim against his own estate and securing its allowance.[84] But while the attorney for the bankrupt should not be permitted to appear in the proceedings as attorney for a creditor also, yet, in the absence of a rule of court on the subject, a claim duly proved against the bankrupt's estate should not be rejected merely because filed for the creditor by the bankrupt's attorney, it being apparent that the attorney acted in entire good faith.[85]

§ 529. Proof by Assignee of Claim.—The assignee of a nonnegotiable chose in action may prove it against the estate of the debtor in bankruptcy upon his own deposition, and it is not necessary to the sufficiency of the proof that the deposition of the assignor should be added, if the assignment was made before the commencement of the proceedings in bankruptcy, although, in that case, the deposition should show the name of the original creditor.[86] Under the provision of the law which requires the proof of debt to set forth the "consideration" of the claim, it is necessary, in the case of a simple chose in action, or a contract for the payment of money not negotiable, in the hands of an assignee or purchaser of the same, that the proof should state the consideration upon which it rested as between the original parties, and

a proof of claim, but only for one particular creditor; that is, he may not engage in what is practically the business of an attorney at law by collecting and managing large numbers of claims. In re H. E. Ploof Machinery Co. (D. C.) 243 Fed. 421, 38 Am. Bankr Rep. 795.

[81] In re Sugenheimer, 91 Fed. 744, 1 Am. Bankr. Rep. 425. This is in view of the fact that section 20 of the bankruptcy law provides that oaths required by the act may be administered by "diplomatic or consular officers of the United States in any foreign country."

[82] In re Sugenheimer, 91 Fed. 744, 1 Am. Bankr. Rep. 425.

[83] In re Republic Ins. Co., 8 N. B. R. 197, Fed. Cas. No. 11,705.

[84] In re Mitteldorfer, Chase, 276, 3 N. B. R. 39, Fed. Cas. No. 9,674.

[85] In re Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144.

[86] In re McCarthy Portable Elevator Co., 205 Fed. 986, 30 Am. Bankr. Rep. 247; Ex parte Davenport, 1 Low. 384, 3 N. B. R. 312, Fed. Cas. No. 3,586; In re Kenny (D. C.) 269 Fed. 54, 46 Am. Bankr. Rep. 214. The fact that certain creditors have made a champertous agreement with a third party for the collection of their debts from the bankrupt furnishes no ground for the disallowance of such claims, on petition of a creditor. In re Lathrop, 3 Ben. 490, 3 N. B. R. 410, Fed. Cas. No. 8,103.

not merely the consideration upon which it passed to the present holder. But negotiable paper, acquired in good faith before maturity, may be proved against the estate of the maker in bankruptcy by an indorsee upon showing a valid consideration paid by him; and such showing, in such a case, will be held to be a compliance with the requirement of the statute, and it will not be required of the holder to show that, as between the maker of the paper and its original payee, there was a good and valid consideration, or what that consideration was.[87]

Even after the commencement of proceedings in bankruptcy against a debtor, claims against him may be assigned and transferred. There is nothing in the statute or its policy to restrain the negotiability of debts. On the contrary the law recognizes this as something that will take place and makes provision for proof accordingly.[88] And where, after the filing of a petition in bankruptcy by or against the debtor, a creditor transfers or assigns his debt to another, the debt is to be proved by the person who is the owner of it at the time of making proof; but in this case, the deposition of the owner must be "supported" by a deposition of the person who was the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt and the particulars as to its being secured or unsecured, and the language of the form prescribed for the proof of debts will have to be modified to suit the circumstances of the case.[89] It is held that the receiver of the property of a creditor is an "assignee" of the debts due to such creditor, and may prove the debt in bankruptcy in the manner contemplated for proof by a conventional assignee.[90] But a mere agent holding negotiable paper, not as owner or indorsee, but simply for his principal, cannot prove it except in the name and for the benefit of the real owner, and not at all when the owner is in a situation to make the proof for himself.[91]

§ 530. Proof by Persons Contingently Liable for Bankrupt.—The bankruptcy law provides that "whenever a creditor, whose claim against

[87] In re Lake Superior Ship-Canal, R. & I. Co., 10 N. B. R. 76, Fed. Cas. No. 7,998.

[88] In re Murdock, 1 Low. 362, Fed. Cas. No. 9,939. And see In re Sweetser (D. C.) 131 Fed. 567. Where assignment is made of a claim which has already been proved and allowed in the bankruptcy proceedings, it is neither necessary nor proper for the assignee to make a fresh proof of it in his own name; and this is true, even though the assignor questions the fact or validity of the assignment. In re Breakwater Co. (D. C.) 232 Fed. 375, 36 Am. Bankr. Rep. 752; In re Louis J. Bergdoll Motor Co. (D. C.) 230 Fed. 248, 36 Am. Bankr. Rep. 265. The allowance by the referee of the transfer of a claim against the bankrupt estate is binding upon other creditors, who might have opposed it, whether they did so or not. In re Sweetser (D. C.) 240 Fed. 167.

[89] In re McCarthy Portable Elevator Co. (D. C.) 205 Fed. 986, 30 Am. Bankr. Rep. 247; In re Murdock, 1 Low. 362, Fed. Cas. No. 9,939; In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4,932; General Order No. 21, clause 3.

[90] In re Mills, 17 N. B. R. 472, Fed. Cas. No. 9,612

[91] In re Saunders, 2 Low. 444, 13 N. B. R. 164, Fed. Cas. No. 12,371.

a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." And in execution of this provision, the General Orders in bankruptcy provide that "the claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable, but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.[92]

§ 531. **Form and Sufficiency of Deposition.**—The bankruptcy act provides that "proof of claims shall consist of a statement under oath, in writing, signed by a creditor, setting forth his claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor." To this the general orders in bankruptcy add the requirement that the proof shall be made by a "deposition" which shall be correctly entitled in the court and in the cause; and the officially prescribed forms contain precedents for proofs of claims in various circumstances.[93] Depositions to prove claims must contain the averments and the particular details required by the statute, and must be made by the party authorized, and conform substantially to the official forms.[94] Thus, a claim is not duly proved unless it appears from the deposition that a debt exists which the creditor has a present right to have paid out of the bank-

[92] Bankruptcy Act 1898, § 571; General Order No. 21, cl. 4. A creditor whose claim is secured by the liability of a co-debtor of the bankrupt, or one who is a guarantor or surety for him, is not obliged, by anything in the law, to prove his claim and proceed in the bankruptcy proceedings. If he chooses, he may rely wholly upon the secondary liability, neglecting the bankrupt's estate, and the liability of the guarantor or surety will not be affected by the bankrupt's discharge. But if the creditor takes this course, the act very justly gives to the person contingently or secondarily liable for the bankrupt a right to prove the claim in the name of the creditor, and to pay it wholly or in part, with the right of subrogation. If, then, he thinks the bankrupt's estate may be made to pay a part of the claim, this is the course for him to pursue, for he will thus indemnify himself, to the extent of the dividends received, though remaining liable to the creditor for the unpaid balance. See In re Levy, 2 Ben. 169, 1 N. B. R. 327, Fed. Cas. No. 8,297.

[93] Bankruptcy Act 1898, § 57; General Order No. 2; Forms Nos. 31–37. The word "deposition," as here used, is not to be understood as requiring the same sort of desposition by which the testimony of a witness is taken. The requirements, both of the act and the general order, are satisfied by a paper prepared by the creditor himself or by his attorney, containing all that is necessary, in the form of an affidavit. See In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9,463.

[94] In re Port Huron Dry Dock Co., 14 N. B. R. 253, Fed. Cas. No. 11,293. Though a proof of debt fails to state one of the essential facts required by good

rupt's estate.[95] But it is not the duty of the refereee in bankruptcy to examine claims filed further than to discover whether or not the deposition contains the formal requisites prescribed by the statute, the general order, and the forms.[96] But an allegation on information and belief, on a vital point in a proof of claim in bankruptcy, is not sufficient as proof of such allegation.[97] And the absence of a date to the creditor's proof of claim is a fatal defect.[98]

As to the particular averments of the deposition, it is, in the first place, strictly required and imperatively necessary that it should state whether the claim is secured or unsecured; and if the creditor has a lien on property to secure it, he must disclose its particular character, so that it can be identified, and, if necessary, liquidated by the trustee in bankruptcy.[99] It is also necessary to set forth the fact and the particulars of any partial payments which may have been made upon the claim.[100] And it is indispensable that the consideration for the claim, and the particulars of the consideration, should be duly and adequately stated in the deposition.[101] The statements in regard to the consideration must be sufficiently full and specific to enable other creditors to pursue proper and legitimate inquiries as to the fairness and legality of the claim; if too meagre or general to serve this purpose, they will be held inadequate, and the proof of debt will be expunged, unless leave is given to amend.[102]

pleading, yet if it complies apparently with the forms in bankruptcy and the orders and the statute itself, it is the duty of the referee to allow it. In re Ankeny, 1 Nat. Bankr. News, 511. The fact that, at the head of a proof of claim, the title of the court is not given as required by the general order and form, is not sufficient to vitiate the proof so far as to prevent the creditor from participating in the creditors' meeting. In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36. A proof of claim need not observe all the formalities required in ordinary pleadings. Kelsey v. Munson, 198 Fed. 841, 117 C. C. A. 483, 28 Am. Bankr. Rep. 520.

[95] In re Walton, Deady, 510, Fed. Cas. No. 17,129. As to proof of claim against bankrupt partnership and the individual partners, see Adams v. Brown, 226 Fed. 688, 141 C. C. A. 444, 35 Am. Bankr. Rep. 302; In re Collins (D. C.) 215 Fed. 247.

[96] In re Ankeny, 1 Nat. Bankr. News, 511. The referee has power to require a bill of particulars of an item in the claim, whether liquidated or unliquidated, and the matter is within his judicial discretion. In re Henry Siegel Co., 223 Fed. 368, 35 Am. Bankr. Rep. 128.

[97] In re United Wireless Telegraph Co., 201 Fed. 445, 29 Am. Bankr. Rep. 848.

[98] In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36.

[99] Cunningham v. Cady, 13 N. B. R. 525, Fed. Cas. No. 3,480; In re Bridgman, 1 N. B. R. 312, Fed. Cas. No. 1,866; Emerine v. Tarault, 219 Fed. 68, 134 C. C. A. 606, 34 Am. Bankr. Rep. 55.

[100] In re Girvin, 160 Fed. 197, 20 Am. Bankr. Rep. 490.

[101] In re Elder, 1 Sawy. 73, 8 N. B. R. 670, Fed. Cas. No. 4,326. A claim for legal services rendered to the bankrupt is insufficient if it does not show the nature of the services, their value, or the time consumed. In re Hudson Porcelain Co. (D. C.) 225 Fed. 325, 35 Am. Bankr. Rep. 18. Where a creditor holds more than one note against the bankrupt they should be proved as a single claim. Frederick v. Citizens' Nat. Bank, 231 Fed. 667, 145 C. C. A. 553, 37 Am. Bankr. Rep. 22.

[102] In re United Wireless Telegraph Co., 201 Fed. 445, 29 Am. Bankr. Rep. 848; In re Goble Boat Co., 190 Fed. 92, 27 Am. Bankr. Rep. 48; In re Griffin,

A proof of debt on a promissory note is not sufficient although it sets out the note in full, unless it also states what was the consideration and whether any payments have been made thereon.[103] But this rule does not apply to a debt which has been reduced to judgment; that is to say, it is not necessary in proving on the judgment to recite or describe the consideration of the original debt, as that is now merged in the judgment.[104] In the case of an open account, the rules provide that the deposition "shall state when the debt became or will become due; and if it consists of items maturing at different dates, the average due date shall be stated, in default of which it shall not be necessary to compute interest on it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon." [105]

"Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim." [106] A judgment is not an "instrument of writing" within the meaning of this provision.[107] Consequently if the creditor's claim is founded on a judgment, it will not be necessary for him to file with the proof of the claim a transcript of the judgment, but the deposition should contain a brief recital of the judgment, such as will enable other parties interested to identify it and to consult the record of it in the court where rendered. When, therefore, the creditor held a promissory note made by the bankrupt and has already recovered a judgment upon it, if he proves his claim on the note, it must be filed with the deposition, but if he proves a claim on the judgment, instead of the note, the note need not be produced, because it is merged in the judgment as a debt of a higher order, and the judgment need not be set out in full in the deposition, nor accompany it, because it is not an "instrument of

188 Fed. 389; In re Watertown Paper Co., 169 Fed. 252, 94 C. C. A. 528, 22 Am. Bankr. Rep. 190; In re Coventry Evans Furniture Co., 166 Fed. 516, 22 Am. Bankr. Rep. 272; In re Morris, 154 Fed. 211, 18 Am. Bankr. Rep. 828; In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36; In re Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806; In re Scott, 93 Fed. 418, 1 Am. Bankr. Rep. 553.

[103] In re Loder, 4 Ben. 125, 3 N. B. R. 655, Fed. Cas. No. 8,456.

[104] In re Mott, Fed. Cas. No. 9,878b.

[105] General Order No. 21, clause 1.

[106] Bankruptcy Act 1898, § 57a. But see Kelsey v. Munson (C. C. A.) 198 Fed. 841, 28 Am. Bankr. Rep. 520, holding that all the formalities required in ordinary pleadings do not apply to proofs in bankruptcy, and that a failure to file a written instrument upon which a claim is founded does not raise a presumption against the existence of the writing. Where claimant had made various loans to the bankrupt, giving him a check for the amount in each instance, the items cannot be deemed founded on an instrument in writing, in such sense as to necessitate setting forth the various checks in the proof of claim. In re Keller (D. C.) 252 Fed. 942, 42 Am. Bankr. Rep. 601.

[107] This is shown not only by the con-

writing."[108] If a promissory note of the bankrupt was made payable in coin, the holder, in proving his debt in the bankruptcy, should set forth that fact in his deposition, and the demand should be entered upon the books of the trustee as payable in the stipulated currency.[109] In proving a claim founded upon a note in which only the initials of the Christian names are given, the full names must appear.[110] Finally, it should be observed that the creditor, in making out his proof of claim, will do well to add his proper address, in order that notices thereafter mailed may duly reach him, for these notices are to be sent to the creditors by mail "to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors."[111]

§ 532. **Acknowledgment of Deposition.**—Depositions in support of claims filed in bankruptcy must be verified. The following provision of the statute is applicable to this matter: "Oaths required by this act, except upon hearings in court, may be administered by (1) referees, (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken, and (3) diplomatic or consular officers of the United States in any foreign country."[112] A notary public is authorized to administer the oath to a proof of claim, and such oath is sufficiently authenticated, prima facie, by what purport to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the statutes of either state.[113] And it has been held that it is not a valid objection to the proof of a claim that the officer taking the acknowledgment was the creditor's own attorney.[114]

§ 533. **Receiving and Filing Proofs.**—The mere execution and acknowledgment of a proof of claim is not sufficient to establish the status

text, but further by the distinction which the act makes in the section relating to provable debts (§ 63) where it speaks of a "fixed liability evidenced by a judgment or an instrument in writing." Under a statute providing that, where a pleading is founded on any "written instrument," the original thereof or a copy must be filed with the pleading, it is held that a judgment is not a written instrument. Lytle v. Lytle, 37 Ind. 281.

[108] In re Knoepfel, 1 Ben. 398, 1 N. B. R. 70, Fed. Cas. No. 7,892. See In re Jaycox, 7 N. B. R. 303, Fed. Cas. No. 7,240; In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428.

[109] In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326.

[110] In re Valentine, 4 Biss. 317, 12 N. B. R. 389, Fed. Cas. No. 16,812.

[111] Bankruptcy Act 1898, § 58a.

[112] Bankruptcy Act 1898, § 20. In regard to acknowledging the deposition in a foreign country, see also In re Lynch, 16 N. B. R. 38, Fed. Cas. No. 8,635.

[113] In re Pancoast, 129 Fed. 643, 12 Am. Bankr. Rep. 275. See In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10073; In re McKibben, 12 N. B. R. 97, Fed. Cas. No. 8,859.

[114] In re Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144. Compare In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10,073; In re Keyser, 9 Ben. 224, Fed. Cas. No. 7,748.

of the creditor. It is further necessary that the claim, thus proved, should be filed or presented in the bankruptcy proceeding.[115] This is ordinarily done by the creditor in person, or by his attorney or some one else authorized to act for him. The bankrupt's attorney should not be employed for this purpose. He cannot properly represent any creditor. But the mere fact that he filed a claim for a creditor will not be sufficient to justify its rejection if the claim was duly proved and it appears that he acted in entire good faith.[116] The practice in regard to the filing and custody of proofs of claims is to be learned from several provisions of the statute and the general orders. First, "claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred."[117] Again, "proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with referee or with the clerk."[118] The claimant may hand his proof to the trustee, if one has been appointed, but "proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."[119] And the handing of a verified claim to an employé of the trustee in the latter's office does not constitute a filing of the claim, where it was not in fact filed and it does not appear in what capacity the person with whom it was left was employed by the trustee.[120] And a trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee be deemed the equivalent of a delivery to such referee.[121] Finally, it is provided that "the referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors."[122] From these various provisions it appears that the referee in bankruptcy is the proper person to receive the proofs of debts; that, if they are filed in the clerk's office, they must be transmitted to the referee; that the referee is to retain the custody of the depositions until the termination of the case; and that it devolves upon the trustee to call on the referee and procure a list of the proved claims.

[115] In re French, 181 Fed. 583, 25 Am. Bankr. Rep. 77.

[116] In re Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144.

[117] Bankruptcy Act 1898, § 57c.

[118] General Order No. 20.

[119] General Order No. 21. As to the authority of the Supreme Court to make this order, see J. B. Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, 17 Am. Bankr. Rep. 72.

[120] In re Lathrop, Haskins & Co., 197 Fed. 164, 116 C. C. A. 601, 28 Am. Bankr. Rep. 756.

[121] J. B. Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, 17 Am. Bankr. Rep. 72.

[122] General Order No. 24.

The referee will not generally refuse to receive a proof of debt which appears on its face to have been taken before a proper officer and to be correct in form and substance.[123] But the statute is not satisfied by the creditor's merely swearing to the validity of his claim. A creditor who, after making a deposition to prove his debt, retains possession of the deposition, and does not allow it to go upon the files, cannot be considered as a creditor who has proved his debt.[124] On the other hand, a creditor cannot be prejudiced by the loss from the files of his proof of debt; he will still be entitled to receive the notices provided for by the act.[125]

§ 534. Allowance or Disallowance of Proved Claims.—The bankruptcy law provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."[126] Undoubtedly the word "court," as here used, includes the referee, especially as another part of the act provides that, at the first meeting of creditors, "the judge or referee shall preside and may allow or disallow the claims of creditors there presented."[127] The first meeting of creditors here spoken of means the first meeting after the adjudication, and claims cannot be allowed without a meeting of the creditors.[128] It should be observed that the "proof" and the "allowance" of claims are separate and distinct steps, so that, for instance, if a claim is duly proved and filed within the year granted for that purpose, it is enough to take it out of the statutory limitation, and its allowance or disallowance may come later.[129] And further, the filing of a proved claim does not necessarily constitute an allowance thereof, since, until a direct or indirect order of allowance is made, objections may properly be filed.[130] But a proof of debt, made in the mode re-

[123] In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9,463; In re Ankeny, 1 Nat. Bankr. News, 511. See In re Loder, 4 Ben. 125, 3 N. B. R. 655, Fed. Cas. No. 8,456. The referee has no right to refuse to file a claim presented, on the ground of its informality. In re Drexel Hill Motor Co. (D. C.) 270 Fed. 673, 46 Am. Bankr. Rep. 411.

[124] In re Sheppard, 1 N. B. R. 439, Fed. Cas. No. 12,753.

[125] In re Friedlob, 19 N. B. R. 122, Fed. Cas. No. 5,118.

[126] Bankruptcy Act 1898, § 57d. See In re James Dunlap Carpet Co., 171 Fed. 532, 22 Am. Bankr. Rep. 788; Keith v. Kilmer (C. C. A.) 272 Fed. 643, 47 Am. Bankr. Rep. 92.

[127] Bankruptcy Act 1898, § 55b. See Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901.

[128] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835.

[129] In re J. M. Mertens & Co., 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825.

[130] In re Two Rivers Woodenware Co., 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 518.

quired by the statute, and conforming on its face to all the requirements of the act and the general orders, makes a prima facie case, though it is subject to objection and counter proof, and will entitle the creditor to have his debt allowed as an established claim against the estate, unless objections are interposed.[131] In the latter case, the jurisdiction of the court to hear and determine the claim and objections is undoubted, as the voluntary appearance of the creditor for the purpose of filing his claim places it within the control of the court.[132] But if the claim is rejected, on the ground that the creditor holds security for it, the court has then no jurisdiction to value the security and enter a decree against the creditor for the excess of its value over the debt.[133] It should further be noticed that there is nothing in the act which makes a proof of claim an entirety, which the court must either accept in full or reject altogether. If part of the claim is found to be valid, and part must be rejected for want of proper proof or other reasons, the referee may allow the claim the extent that it is valid, and it is not necessary to order it to be amended and resworn.[134]

In allowing or disallowing claims against an estate in bankruptcy, the court is bound by the established rules of law and equity, and cannot arbitrarily exercise its power to allow or reject a claim.[135] But an order either allowing or rejecting a claim is an adjudication of all the issues properly before the court for its determination and binding upon all who have been made parties to the proceeding in bankruptcy, and therefore it cannot be impeached or questioned collaterally.[136] It should, however, be adequately recorded. It has been ruled that a mere minute showing the disallowance of a claim by a referee in bankruptcy

[131] In re J. M. Mertens & Co., 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825; In re Saunders, 2 Low. 444, 13 N. B. R. 164, Fed. Cas. No. 12,371; In re Colman, 2 N. B. R. 562, Fed. Cas. No. 3,021; In re Ankeny, 1 Nat. Bankr. News, 511; International Agr. Corp. v. Carry, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753.

[132] In re Jackson Brick & Tile Co., 189 Fed. 636, 26 Am. Bankr. Rep. 915; In re L'Hommedieu, 146 Fed. 708, 77 C. C. A. 134, 16 Am. Bankr. Rep. 850.

[133] Fitch v. Richardson, 147 Fed. 197, 77 C. C. A. 423, 16 Am. Bankr. Rep. 835.

[134] In re Goldstein, 199 Fed. 665, 29 Am. Bankr. Rep. 301; Streeter v. Lowe, 184 Fed. 263, 106 C. C. A. 405, 25 Am. Bankr. Rep. 774; In re T. L. Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. In re Louis J. Bergdoll Motor Co. (D. C.) 229 Fed. 262; Reynolds v. Hourigan, 254 Fed. 690, 166 C. C. A. 188, 43 Am. Bankr. Rep. 75. See In re Perlmutter (D. C.) 256 Fed. 860, 42 Am. Bankr. Rep. 725.

[135] In re Springfield Realty Co. (D. C.) 257 Fed. 785, 44 Am. Bankr. Rep. 105.

[136] Carr v. Barnes, 138 Mo. App. 264, 120 S. W. 705; Spencer Commercial Club v. Bartmess, 70 Ind. App. 294, 123 N. E. 435. See Skilton v. Codington, 105 App. Div. 617, 93 N. Y. Supp. 460. The disallowance of a claim in bankruptcy for usury is available to a prior purchaser as res judicata of the claim of the holder of a mortgage antedating such purchase and given to secure the usurious debt. De Watteville v. Sims, 44 Okl. 708, 146 Pac. 224.

is not a record of a judgment and is not admissible in evidence to show the final disposition of the claim.[137] And an order of allowance, in so far as concerns its binding effect on the trustee and the other creditors, does not amount to an adjudication that the particular creditor has not previously received an illegal or voidable preference, that question not being necessarily involved in it.[138]

§ 535. Postponement of Proofs.—The bankruptcy act of 1867 contained a provision to the effect that "when a claim is presented for proof before the election of an assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen."[139] Although the present act is not so explicit on this point, still it does provide that claims duly proved shall be allowed upon presentation, unless "their consideration be continued for cause by the court upon its own motion."[140] The interpretation put upon the act of 1867 was that it rested in the discretion and judgment of the court or register to postpone the proof of a claim whenever he deemed it questionable or of doubtful validity, either in respect to its consideration or the right of the particular creditor to prove it, or on the ground of its being voidable under the act as a preference or otherwise; and this was to be done with a view to the investigation by the trustee, when appointed, of the claim in question, and the effect of postponing proofs was to prevent such claims from being voted upon in the election of a trustee.[141] The corresponding provision of the present act, it is said, intends that, if objection to a claim is interposed, or if the court is not satisfied with the prima facie case made out by the claimant's sworn statement, the claim shall not be accepted as proved until the objection has been disposed of, or until the court is convinced, by testimony or otherwise, of the validity of the claim.[142]

When a review by the judge of the action of the referee in such

[137] Hall v. Robertson, 213 Ill. App. 147. But compare De Watteville v. Sims, 44 Okl. 708, 146 Pac. 224.

[138] Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411, 33 Am. Bankr. Rep. 484; Buder v. Columbia Distilling Co., 96 Mo. App. 558, 70 S. W. 508; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800. Compare Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901.

[139] Rev. Stat. U. S. § 5083, being § 23 of the act of 1867.

[140] Bankruptcy Act 1898, § 57d.

[141] In re Stevens, 4 Ben. 513, 4 N. B. R. 367, Fed. Cas. No. 13,391; In re Jacoby, Fed. Cas. No. 7,166; In re Bartusch, 9 N. B. R. 478, Fed. Cas. No. 1,086; In re Jones, 2 N. B. R. 59, Fed. Cas. No. 7,447; In re Frank, 5 Ben. 164, 5 N. B. R. 194, Fed. Cas. No. 5,050.

[142] In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146.

cases is sought, the better practice on behalf of the creditors who object to such postponement of their claims is to have the objection noted, obtain a stay of proceedings, and have the case certified, before any further action is taken before the referee, for if no objection is made at the time, and the trustee is appointed and enters upon his duties, the court will not interfere.[143] When the claim of a creditor, at the first meeting, is postponed by the referee, and again presented after the election of a trustee, the proof of claim must be treated in all respects as if it had not been before tendered; that is, such action does not cast upon the creditor the necessity of producing evidence in support of its validity, or of taking any other affirmative action not required in ordinary cases for the proof of a debt.[144]

§ 536. Objections to Claims; Who May Object.—The bankruptcy act provides that objections to the allowance of a claim offered for proof by a creditor of the bankrupt may be made by "parties in interest."[145] This vague phrase, so frequently used in the act, may probably, in this connection, include the bankrupt himself. If he should prove to be solvent (which may happen, and occasionally does happen, in a case of voluntary bankruptcy), any surplus of the estate remaining after paying creditors and the cost of the proceeding will belong to the bankrupt. Further, it is to his "interest" in the popular if not the legal sense that his creditors should receive as large a dividend as may be. Moreover, the act makes it the duty of the bankrupt to "examine the correctness of all proofs of claims filed against his estate," and "in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee."[146] This seems to contemplate that the objections should be made by the trustee on information to be furnished by the bankrupt. But if false claims are offered for allowance at or before the first meeting of creditors, and therefore before a trustee has been appointed, it is more consonant to the general purpose and policy of the act that the bankrupt should object to their allowance than that he should allow them to be proved and afterwards advise the trustee of their fraudulent character, as, in that

[143] In re Jackson, 7 Biss. 280, 14 N. B. R. 449, Fed. Cas. No. 7,123.

[144] In re Herrmann, 4 Ben. 126, 3 N. B. R. 649, Fed. Cas. No. 6,425.

[145] Bankruptcy Act 1898, § 57d.

[146] Bankruptcy Act 1898, § 7, clauses 3 and 7. Where the bankrupt is a corporation, and its stockholders are the only persons who would be injuriously affected by the allowance of a contested claim, since its allowance would necessitate an assessment upon them, they are "parties in interest" and entitled to object to the claim. Rosenbaum v. Dutton, 203 Fed. 838, 122 C. C. A. 156, 30 Am. Bankr. Rep. 155.

case, the only remedy of the trustee would be to move for their reconsideration and expunction.[147]

As to other "parties in interest," it is clear that the trustee himself, as the representative of all the creditors, is authorized to contest the allowance of any claim filed against the estate.[148] And if he neglects or refuses to take this action, in regard to any claim alleged to be fraudulent, false, or exaggerated, creditors who have proved their debts may personally intervene and oppose its allowance.[149] And the general trend of the decisions is to the effect that any creditor may proceed on his own initiative to object to the allowance of a claim offered by another, and is not required to present his objections through the trustee, or to show that the latter has been asked to act and has refused,[150] provided, however, that the contesting creditor shall first have proved his own claim and secured its allowance.[151] But an objecting creditor cannot further contest the claim of another creditor after a decision on its validity by the court. Proceedings to review such decision must be taken by the trustee by appeal.[152] And the creditor at whose instance the trustee contests the claim of another creditor is liable to the latter for costs where the claim is allowed.[153] It should be added that the right to contest claims does not belong to those who are merely debtors or alleged debtors of the bankrupt.[154]

§ 537. Same; Manner and Form of Objections.—Under the bankruptcy act of 1867, it was held that objections to the proof of a claim

[147] See In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72; In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188. But compare Trabue v. Ash (Tex. Civ. App.) 200 S. W. 415.

[148] Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Two Rivers Woodenware Co., 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 439. But where the validity of a claim is conceded, and the only dispute is between two persons about the ownership of it, the controversy concerns them alone, and the trustee, as the representative of the other creditors, has no interest. In re Dunlap Carpet Co., 206 Fed. 726, 30 Am. Bankr. Rep. 664.

[149] First Nat. Bank v. Cooper, 20 Wall. 171, 22 L. Ed. 273; In re Knox Automobile Co. (D. C.) 229 Fed. 241.

[150] In re Canton Iron & Steel Co., 197 Fed. 767, 28 Am. Bankr. Rep. 791; In re Hatem, 161 Fed. 895, 20 Am. Bankr. Rep. 470; In re Wyoming Valley Ice Co., 153 Fed. 787; In re Joseph, 2 Woods, 390, Fed. Cas. No. 7,532; In re Overton, 5 N. B. R. 366, Fed. Cas. No. 10,625. Compare In re Randall, 1 Sawy. 56, Fed. Cas. No. 11,552.

[151] Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; First Nat. Bank v. Cooper, 20 Wall. 171, 22 L. Ed. 273. Claimants whose claims have been disallowed cannot object to the payment of dividends to creditors whose claims are uncontested. In re Stringer (D. C.) 244 Fed. 629, 40 Am. Bankr. Rep. 474.

[152] In re Troy Woolen Co., 9 Blatchf. 191, Fed. Cas. No. 14,202. A creditor cannot object to the allowance of claims of other creditors where he did not move to expunge them and took no exception to the decision of the referee allowing them. In re Collins (D. C.) 235 Fed. 937, 37 Am. Bankr. Rep. 692.

[153] In re Troy Woolen Co., 8 N. B. R. 412, Fed. Cas. No. 14,203.

[154] In re Sully, 152 Fed. 619, 81 C. C. A. 609, 18 Am. Bankr. Rep. 123.

must be made by written allegations, which should specify with reasonable certainty the particular grounds of objection.[155] Though the present statute contains no positive requirement to this effect (the act merely providing that claims duly proved shall be allowed "unless objection to their allowance shall be made by parties in interest") it is unquestionably good practice to file the objections in this form, and the later decisions so recommend, with the further statement that the allegations should be sufficiently explicit to indicate to the claimant the nature and character of the objections.[156] But no particular form for the objections has been prescribed, the matter resting very largely in the discretion of the referee, and it is not necessary, nor even proper, that they should take the shape of a formal pleading.[157] Nor is the statement of objections required to be under oath.[158] And it is within the discretion of the referee to permit a merely oral statement on the part of the objecting creditor, provided it is definite and to the point.[159] But it is held that creditors who desire to contest the allowance of a claim must make their objections on their own behalf, and they cannot become parties to the issue merely by formally adopting objections filed by the bankrupt, nor have they any standing to contest such claim on an appeal taken from the decision of the court by the trustee, in which they did not join.[160]

§ 538. Same; Grounds of Objection.—As to the grounds on which objection may be made to a claim offered for proof, it is clear that it may be contested for fraud, illegality,[161] or want of consideration;[162] also for being fictitious or exaggerated; or because it is not of a nature to be provable under the bankruptcy law; or because it has been paid or discharged, wholly or in part, or is barred by the statute of limitations;[163] or because the proving creditor has received a preference which he has not surrendered,[164] or a security which he has not mentioned; or because of defects in the form or manner of the proof.[165]

[155] In re Walton, Deady, 442, Fed. Cas. No. 17,128.

[156] Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497, 29 Am. Bankr. Rep. 876; In re Royce Dry Goods Co., 133 Fed. 100, 13 Am. Bankr. Rep. 257.

[157] Orr v. Park, 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126.

[158] In re Wooten, 118 Fed. 670, 9 Am. Bankr. Rep. 247.

[159] In re Cannon, 133 Fed. 837, 14 Am. Bankr. Rep. 114; Embry v. Bennett, 162 Fed. 139, 20 Am. Bankr. Rep. 651.

[160] Ayres v. Cone, 138 Fed. 778, 71 C. C. A. 144, 14 Am. Bankr. Rep. 739.

[161] In re Fenn, 172 Fed. 620, 22 Am. Bankr. Rep. 833.

[162] In re Romadka Bros. Co. (D. C.) 206 Fed. 944.

[163] In re John J. Lafferty & Bro., 122 Fed. 558, 10 Am. Bankr. Rep. 290; Pace's Trustee v. Pace, 162 Ky. 457, 172 S. W. 925. Compare In re Gibson, 4 Ind. T. 498, 69 S. W. 974, 4 Ann. Cas. 938.

[164] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305.

[165] Where a claim was allowed

But a mere informality in the proof will not cause the rejection of the claim when the creditor, under examination, has testified positively to facts which establish its validity.[166] And the fact that one presenting a claim against the bankrupt is closely related to him, while it will justify a rigid scrutiny of the claim, will not alone warrant its rejection.[167]

When a judgment debt is offered for proof, the petition of the bankrupt having been filed after the rendition of the judgment, it may be objected to by the trustee or by other creditors on the ground of fraud or irregularity, including fraudulent preference; for they, not being parties or privies to the judgment, are not precluded from attacking it collaterally.[168] For similar reasons, the trustee is not bound by a mere settlement or accounting, not followed by payment or transfer of property, between the bankrupt and a creditor, but he may show that it was erroneous or fraudulent.[169] And so also the trustee may set up usury as a defense to the claim of a creditor.[170] But as against a negotiable note made by the bankrupt, the trustee can avail himself only of such defenses as were available to the maker, not including collateral issues between the indorsers subsequent to delivery.[171]

§ 539. **Same; Contest and Determination.**—The law intends that contests of this character shall be promptly disposed of. It declares that "objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit."[172] Hence if objection is made to the allowance of a claim presented at a meeting of the creditors, the question of

against a bankrupt firm and the bankrupt estate of an individual partner, the trustee was estopped after four years to object that the claim was insufficient in form to justify its allowance against the partner's estate. In re Collins (D. C.) 215 Fed. 247.

[166] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

[167] Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40.

[168] Chandler v. Thompson, 120 Fed. 940, 57 C. C. A. 230; Ex parte O'Neil, 1 Low. 163, 1 N. B. R. 677, Fed. Cas. No. 10,527; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700; In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74, 37 Am. Bankr. Rep. 102; In re Stucky Trucking & Rigging Co. (D. C.) 243 Fed. 287, 38 Am. Bankr. Rep. 690. Compare Stilwell v. Walker, 17 N. B. R. 569, Fed. Cas. No. 13,451.

[169] In re Comstock, 3 Sawy. 620, 12 N. B. R. 110, Fed. Cas. No. 3,079. Where a claim against a bankrupt corporation was based on the theory that it had assumed payment of a mortgage, but it appeared that there had been no such assumption, the claimant cannot sustain his claim on a different theory. In re Amsdell-Kirchner Brewing Co. (D. C.) 240 Fed. 492.

[170] In re Stern, 144 Fed. 956, 76 C. C. A. 10, 16 Am. Bankr. Rep. 510 (reversing In re Worth, 130 Fed. 927, 12 Am. Bankr. Rep. 566); In re Moore, Fed. Cas. No. 9,752; Bromley v. Smith, 2 Biss. 511, 5 N. B. R. 152, Fed. Cas. No. 1,922; Loganville Banking Co. v. Forrester, 17 Ga. App. 246, 87 S. E. 694.

[171] In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700.

[172] Bankruptcy Act 1898, § 57f.

its allowance should be heard as soon as feasible, and if the court is not satisfied with the weight of the evidence, the hearing may be adjourned to a future time.[173] A creditor presenting his claim for proof and allowance against the estate of the bankrupt, which is contested by the trustee, is not entitled to demand a trial by jury.[174] Proceedings in bankruptcy being of equitable cognizance, the seventh amendment to the Constitution of the United States does not apply thereto, and no act of Congress at present in force authorizes trial by jury in such cases.[175] Such contests are intended to be heard and determined by the referee, and he has full jurisdiction over them.[176] And it is not necessary that he should adhere to any prescribed order of proof.[177]

Where the trustee objects to the allowance of a claim on the ground that the claimant has received an unlawful preference, and the referee, on hearing, decides that such is the case, his judgment disallowing the claim is res judicata on the question of the preference, and the creditor cannot litigate the question again in a plenary action by the trustee to recover the preference.[178]

§ 540. Same; Burden of Proof and Evidence.—The burden of proof is on one claiming to be a creditor of a bankrupt and presenting a demand against his estate.[179] But he sustains the burden in the first instance, and makes out a prima facie case, when he files a proof of his claim, sufficient in form and substance, and duly verified by his affidavit, as required by the statute, as such proof is regarded rather as a deposition than as a pleading.[180] Thereupon the burden is shifted to the objecting creditor or creditors, or the trustee as the representative of all the creditors, and they are required to rebut the claimant's prima facie case by evidence having a probative value at least equal to his

[173] In re Eagles (D. C.) 99 Fed. 695, 3 Am. Bankr. Rep. 739.

[174] But the claimant is entitled to notice of the objections and an opportunity to be heard. But where he appears before the referee and files a response to the referee's objection to his claim, this amounts to a waiver of notice of the objection which should have been given him, and cures all defects therein. Davenport Sav. Bank v. Chicago, R. I. & P. R. Co., 176 Iowa, 745, 158 N. W. 737.

[175] In re Christensen (D. C.) 101 Fed. 243, 4 Am. Bankr. Rep. 99.

[176] In re Schwarz (D. C.) 200 Fed. 309, 29 Am. Bankr. Rep. 700; McCulloch v. Davenport Sav. Bank (D. C.) 226 Fed. 309, 35 Am. Bankr. Rep. 765.

[177] In re Montgomery (D. C.) 185 Fed. 955, 25 Am. Bankr. Rep. 431.

[178] Lincoln v. People's Nat. Bank (D. C.) 260 Fed. 422, 44 Am. Bankr. Rep. 381; Ullman, Stern & Krausse v. Coppard, 246 Fed. 124, 158 C. C. A. 350, 40 Am. Bankr. Rep. 426; Davenport Sav. Bank v. Chicago, R. I. & P. R. Co., 176 Iowa, 745, 158 N. W. 737.

[179] In re Graves (D. C.) 182 Fed. 443, 25 Am. Bankr. Rep. 372; In re Hopper-Morgan Co. (D. C.) 156 Fed. 533, 19 Am. Bankr. Rep. 539.

[180] Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, 15 Am. Bankr. Rep. 326; In re United Wireless Telegraph Co., 201 Fed. 445, 29 Am. Bankr. Rep. 848; In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700; In re Montgomery, 185 Fed. 955, 25 Am. Bankr. Rep. 431; In re Baumhauer, 179 Fed. 966, 24 Am. Bankr. Rep. 750; In re James Dunlap Carpet Co., 171 Fed. 532, 22 Am. Bankr. Rep. 788; In re Jones,

affidavit.[181] Likewise, where the claim is for damages for breach of a contract, and the claimant has sufficiently established the elements of his case, the burden is on objecting creditors to show any circumstances in reduction or mitigation of damages.[182] But in order to support the claimant's demand and warrant its allowance the proof of claim must conform to the requirements of the law and be fair on its face. It is not self-proving if insufficient in form, or if its recitals are contradictory and irreconcilable, or if the facts alleged are improbable and suspicious.[183] And it is a rule that if the claimant does not choose to rely on the presumption of correctness of his claim raised by the formal proof of it, but elects to offer additional evidence, and such evidence is insufficient to establish his case or contradicts the allegations of his petition, he must abide by the result, and be taken to have waived the advantage of the position which he originally occupied.[184]

When objection is made to a proof of claim, the proving creditor may be summoned as a witness and be questioned (in the nature of cross-examination) by the trustee or the objecting creditors, concerning his claim and its particulars; and if he fails to appear and submit to such examination, he will be taken to have admitted the objections to his claim, and the same will be rejected.[185] But testimony of the bank-

151 Fed. 108, 18 Am. Bankr. Rep. 206; In re Castle Braid Co., 145 Fed. 224, 17 Am. Bankr. Rep. 143; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Dresser, 135 Fed. 495, 68 C. C. A. 207, 13 Am. Bankr. Rep. 747; In re Wooten, 118 Fed. 670, 9 Am. Bankr. Rep. 247; In re Shaw, 109 Fed. 780, 6 Am. Bankr. Rep. 499; In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; Flower v. Commercial Trust Co., 223 Fed. 318, 138 C. C. A. 580, 35 Am. Bankr. Rep. 74; Moore v. Crandall, 205 Fed. 689, 124 C. C. A. 11, 30 Am. Bankr. Rep. 517; In re Arthur E. Pratt Co. (D. C.) 252 Fed. 917, 42 Am. Bankr. Rep. 406; In re Welborne (D. C.) 266 Fed. 385; Board of Commerce of Ann Arbor v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486, 34 Am. Bankr. Rep. 762.

[181] In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Sanger, 169 Fed. 722, 22 Am. Bankr. Rep. 145; In re Pfaffinger, 154 Fed. 523, 18 Am. Bankr. Rep. 807; In re Coventry Evans Furniture Co., 166 Fed. 516, 22 Am. Bankr. Rep. 272; West v. W. A. McLaughlin & Co.'s Trustee, 162 Fed. 124, 20 Am. Bankr. Rep. 654; In re Canton Iron & Steel Co., 197 Fed. 767, 28 Am. Bankr. Rep. 791. Compare Mason v. St. Albans Furniture Co., 149 Fed. 898, 17 Am. Bankr. Rep. 868; In re Hull (D. C.) 224 Fed. 796, 34 Am. Bankr. Rep. 447; In re O'Gara & Maguire (D. C.) 259 Fed. 935, 44 Am. Bankr. Rep. 49; Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531.

[182] In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419.

[183] In re Goble Boat Co., 190 Fed. 92, 27 Am. Bankr. Rep. 48; Orr v. Park, 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544; In re Shaw, 112 Fed. 947, 7 Am. Bankr. Rep. 458; In re Hudson Porcelain Co. (D. C.) 225 Fed. 325, 35 Am. Bankr. Rep. 18. Failure to file a written instrument which is the basis of a claim against the bankrupt's estate, as required by the statute, does not raise a presumption against the existence of the writing. In re Dresser, 135 Fed. 495, 68 C. C. A. 207, 13 Am. Bankr. Rep. 747.

[184] In re Greenfield, 193 Fed. 98, 27 Am. Bankr. Rep. 427; In re T. A. McIntyre & Co., 174 Fed. 627, 98 C. C. A. 381, 24 Am. Bankr. Rep. 1; In re McAusland. (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[185] Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306, 26 Am. Bankr. Rep.

rupt or other witnesses taken before the referee in other issues in the bankruptcy proceedings, to which the claimant was not a party and when he was not present, cannot be used against him.[186] If it becomes necessary to take the evidence of witnesses at a distance, the act provides that, when depositions are to be taken in opposition to the allowance of a claim, notice shall be served upon the claimant and filed with the referee.[187] Upon questions of evidence arising upon the proof of debts, the laws of the United States must govern, and not those of the state in which the court may be sitting. This rule was applied in a case where the bankrupt was dead, and it was held that the proving creditor was a competent witness in his own favor to prove the contract out of which his claim arose; for under Rev. Stat. U. S. § 858, a witness cannot be excluded on account of interest except in actions by or against executors, administrators, or guardians, and a proceeding in bankruptcy is in rem and not against the executor of a deceased bankrupt.[188] Under the same rule and the same provision of the Revised Statutes, it is held that, where a contest is made as to a claim offered to be proved against the estate of a bankrupt by his wife, she is a competent witness in her own behalf.[189] But a judgment recovered by the creditor in a state court is not conclusive evidence either of the existence or the amount of his claim, when he seeks to prove it in the bankruptcy proceedings, at least where the trustee was not a party to the suit.[190] And the general rule of law that a party can only recover on the cause of action alleged in his pleading applies to claims presented in bankruptcy, and a claimant who has filed a statement of his demand under oath, as required by the statute, cannot sustain it by evidence of an indebtedness arising in a different manner from that stated.[191] As in other cases, the evidence may be circumstantial on questions of motive, intent, good faith, and the like,[192] and the claimant, if put to his defense, must show all the elements of a valid and enforceable demand, just as on the trial of an issue in a plenary suit,[193] and if he and the bankrupt

385; In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Lount, 11 N. B. R. 315, Fed. Cas. No. 8,543.

[186] In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Hersey, 171 Fed. 1004, 22 Am. Bankr. Rep. 863; In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154.

[187] Bankruptcy Act 1898, § 21c.

[188] In re Merrill, 9 Ben. 165, 16 N. B. R. 35, Fed. Cas. No. 9,466. Conversely, the bankrupt is a competent witness where a claim against his estate is contested, though the creditor is dead and the claim is presented by his executor, In re Moore, Fed. Cas. No. 9,752.

[189] In re Richards, 17 N. B. R. 562, Fed. Cas. No. 11,770; In re Bean, 14 N. B. R. 182, Fed. Cas. No. 1,166. Compare In re Bechtel, Fed. Cas. No. 1,204.

[190] In re Freeman, 117 Fed. 680, 9 Am. Bankr. Rep. 68; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700.

[191] In re Lansaw, 118 Fed. 365, 9 Am. Bankr. Rep. 167; Orr v. Park, 183 Fed. 683, 106 C. C. A. 38, 25 Am. Bankr. Rep. 544.

[192] In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Herman, 207 Fed. 594.

[193] Farnsworth v. Union Trust & Deposit Co., 211 Fed. 912, 128 C. C. A.

are the only witnesses and they squarely contradict each other, circumstances tending to corroborate the one or the other will turn the scale.[194] Where the claimant is the wife, child, or other near relative of the bankrupt, the experience of the courts has taught them that the claim must be closely and carefully scrutinized, though it is also to be remembered that the honest or dishonest character of such a claim is not to be determined by the mere fact of relationship.[195]

The referee should of his own motion consider the credibility of the witnesses and of their testimony, and he is not obliged to allow the claim even if the evidence in its support is uncontradicted.[196] The court retains considerable control over the proceedings in these cases, and if the evidence offered by a claimant is not sufficient to establish his claim, it is in the discretion of the court to direct or allow the taking of additional proof, even after the referee or master has made his report.[197]

§ 541. Amendment and Withdrawal of Proofs.—Proofs of debt may always be amended, if application is made in proper time, in respect to the correction of clerical errors, the supplying of omissions, or to remedy technical defects in the proofs in matters of form, and when the proof is amended so as to comply with the law, it will relate back to the original filing, unless the rights of others have in the mean time intervened.[198] On this point, it has been said: "The court undoubtedly possesses the power, in its discretion, to allow proofs of debt to be

290; Central State Bank v. McFarlan, 257 Fed. 535, 168 C. C. A. 519, 44 Am. Bankr. Rep. 1; In re Maiman (D. C.) 256 Fed. 127, 43 Am. Bankr. Rep. 507; In re Rosenthal & Lehman (D. C.) 120 Fed. 848, 9 Am. Bankr. Rep. 626; In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270. Where a claimant relies on certificates of indebtedness issued by a building and loan association, and it appears that they were fraudulently issued and that the association received no consideration, the purchaser must show that he was a purchaser in good faith and for value. In re German Savings & Loan Ass'n, 253 Fed. 722, 165 C. C. A. 316, 42 Am. Bankr. Rep. 559. An attorney who makes a claim against the estate of a bankrupt corporation for legal services must clearly establish the value of his services. In re United States Molybdenum Co. (D. C.) 255 Fed. 790, 43 Am. Bankr. Rep. 401.

[194] In re Kaldenberg (D. C.) 105 Fed. 232, 5 Am. Bankr. Rep. 6.

[195] Walter v. Atha (C. C. A.) 262 Fed. 75, 45 Am. Bankr. Rep. 150; In re Crumling (D. C.) 214 Fed. 503, 32 Am. Bankr. Rep. 656; In re Kanter (D. C.) 215 Fed. 276.

[196] In re Cannon (D. C.) 133 Fed. 837, 14 Am. Bankr. Rep. 114.

[197] In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[198] In re New York Commercial Co., 233 Fed. 906, 147 C. C. A. 580, 36 Am. Bankr. Rep. 769; In re Ballantine (D. C.) 232 Fed. 271, 37 Am. Bankr. Rep. 111; In re Soltmann (D. C.) 238 Fed. 241, 38 Am. Bankr. Rep. 270; In re A. J. Ellis, Inc., 252 Fed. 483, 164 C. C. A. 399, 42 Am. Bankr. Rep. 387. In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760; In re Salvator Brewing Co., 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769; In re Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806; In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; In re Myrick, 3 N. B. R. 156, Fed. Cas. No. 10,000; In re Montgomery, 3 N. B. R. 423, Fed. Cas. No. 9,729; In re Lowerre, 1 Ben. 406, 1 N. B. R. 74, Fed. Cas. No. 8,577. In re Basha (C. C. A.) 200 Fed. 951, 29 Am. Bankr. Rep. 225.

amended, and in cases of mistake or ignorance, whether of fact or of law, will generally exercise that power in the absence of fraud, and when all parties can be placed in the same situation they would have been in if the error had not occurred, and where justice seems to demand that it should be done. But where the proceeding is in any manner tainted by fraud, or where the creditor has gained any permanent advantage by the omission, or the estate has been permanently injured thereby, the creditor guilty of such omission will be left where his own act has placed him."[199] Thus if a creditor, in proving his claim, has illegally increased the amount of it, or if a portion of the consideration is good and a portion illegal, he will not be allowed, on the detection of the fraud, to separate the good from the bad and amend his proof, or have it allowed for the valid portion only, for his fraud taints the whole.[200] So, where a claim of lien under a mortgage has been declared fraudulent, the claimant is not entitled to amend so as to prove his claim as a general claim against the estate.[201] Neither is it permissible, under the guise of an amendment, to introduce a wholly new and different claim against the bankrupt.[202]

An amended proof of claim against a bankrupt's estate, filed more than a year after the adjudication, may be substituted for the original proof when the latter was defective, irregular, or otherwise insufficient, notwithstanding the provision of the act limiting the time for original filing of proofs.[203] But this rule is subject to two conditions. In the first place, it cannot be invoked for the purpose of enabling the creditor to set up an entirely new and separate claim.[204] But this does not apply to a change in the form or statement of the claim, the actual contract or consideration remaining the same.

[199] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754.

[200] In re Elder, 1 Sawy. 73, Fed. Cas. No. 4,326.

[201] In re Vogt (D. C.) 188 Fed. 764. But see Seligman v. Gray, 227 Fed. 417, 142 C. C. A. 113, 35 Am. Bankr. Rep. 516, 36 Am. Bankr. Rep. 894.

[202] In re Miners' Brewing Co. (D. C.) 162 Fed. 327, 20 Am. Bankr. Rep. 717; In re Montgomery, 3 N. B. R. 430, Fed. Cas. No. 9,731.

[203] Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135; In re Keller (D. C.) 252 Fed. 942, 42 Am. Bankr. Rep. 601; In re Schaffner (C. C. A.) 267 Fed. 977, 45 Am. Bankr. Rep. 681; In re Drexel Hill Motor Co. (D. C.) 270 Fed. 673, 46 Am. Bankr. Rep. 411; In re Roeber, 127 Fed. 122, 62 C. C. A. 122, 11 Am. Bankr. Rep. 464; Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382; In re Salvator Brewing Co., 188 Fed. 522, 26 Am. Bankr. Rep. 21; In re Standard Telephone & Electric Co., 186 Fed. 586, 26 Am. Bankr. Rep. 601; In re Kessler, 184 Fed. 51, 25 Am. Bankr. Rep. 512; In re Fisk & Robinson, 185 Fed. 974; In re McCarthy Portable Elevator Co., 205 Fed. 986, 30 Am. Bankr. Rep. 247. But compare In re Amsdell-Kirschner Brewing Co. (D. C.) 243 Fed. 783, 40 Am. Bankr. Rep. 284; In re Booth (D. C.) 216 Fed. 575, 33 Am. Bankr. Rep. 183; In re Moebius (D. C.) 116 Fed. 47, 8 Am. Bankr. Rep. 590.

[204] In re McCallum & McCallum (D. C.) 127 Fed. 768, 11 Am. Bankr. Rep. 447; In re Stevens (D. C.) 107 Fed. 243, 5 Am. Bankr. Rep. 806.

Thus, where a creditor filed a claim in the form of a book account, an amended claim, based on promissory notes of the bankrupt, may be treated as an amendment of the original claim, and the court may permit it to be filed after the expiration of the year, where it is shown that the notes were given in settlement of the account, but were not shown by the creditor's books, and that the original claim was based on the account, rather than the notes, through mere inattention or because the creditor did not realize that it would make any difference as to the form of proof.[205] So, where the creditor originally filed on a note and the claim was disallowed because it carried usurious interest, he was allowed to amend his proof by substituting therefor a claim for money fraudulently obtained by the bankrupt and received to the claimant's use.[206] In the second place, the original proof must contain a sufficient statement of the claim to support an amendment, or there must have been a sufficient "filing" of it to justify such action.[207] But as to this, the courts are quite liberal. Thus, for example, though a claim was not formally filed within the year, but an assignment of it was executed and filed with the referee, it was held that this might be treated as sufficiently presenting the claim to permit an amendment after the year.[208] So a paper filed by a creditor, denominated an "application for the sale of collateral," and containing all the statements essential to a formal proof of claim, may be used as the foundation for an amendment after the expiration of the year.[209] And again, where the trustee circulated a paper among the creditors for their signatures, containing a proposal for a settlement, each creditor to state on it the amount of his claim, and it was signed by all and returned and filed with the referee within a year after the adjudication, it was held to constitute a sufficient claim to be amendable, after the end of the year, by a creditor who signed it in the belief that a proof of his claim was not required, but without whose assent the settlement could not have been effected.[210] Further, a court of bankruptcy may allow an amended proof, filed with the trustee's consent, to be substituted for the defective original proof, although the trustee has an appeal pending from the decree of the court permitting the creditor to prove his claim.[211]

[205] Brown v. O'Connell, 200 Fed. 229, 118 C. C. A. 415, 29 Am. Bankr. Rep. 653.

[206] In re Robinson (D. C.) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

[207] In re Thompson, 227 Fed. 981, 142 C. C. A. 439, 36 Am. Bankr. Rep. 190; In re Drexel Hill Motor Co. (D. C.) 270 Fed. 673, 46 Am. Bankr. Rep. 411.

[208] Bennett v. American Credit Indemnity Co., 159 Fed. 624, 86 C. C. A. 614, 20 Am. Bankr. Rep. 258.

[209] In re Faulkner, 161 Fed. 900, 20 Am. Bankr. Rep. 542. Compare In re Basha, 193 Fed. 151, 27 Am. Bankr. Rep. 435.

[210] In re Fairlamb, 199 Fed. 278, 28 Am. Bankr. Rep. 515.

[211] Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

The power of allowing amendments is not infrequently appealed to in behalf of secured creditors; and it is well settled that where a creditor of this class has proved his claim as unsecured, but this has been done through inadvertence or mistake or ignorance of his rights, it is in the discretion of the court to allow him to amend his proof so as to state the facts correctly, even after the lapse of a year from the adjudication, provided this will not operate to the prejudice of any other creditor, or provided all parties can be restored to their original positions.[212] And it is not an insuperable objection to the allowance of such an amendment that the creditor has already received a dividend on his claim as unsecured, for it can be made a condition of the leave granted to him to amend that he shall refund to the trustee the sum so received as a dividend.[213] On similar principles, where a bankrupt had money on deposit in a bank and was indebted to the bank on promissory notes for a larger sum, and the cashier of the bank made proof against the bankrupt's estate for the entire sum of the notes, omitting, through mistake or forgetfulness, to offset the amount of the deposit, it was held that the bank should be permitted to amend its proof so as to retain the amount of the deposit, credit the same on the notes, and prove a claim for the balance.[214]

In regard to allowing a creditor who has proved his claim to withdraw the same entirely, so as to put himself outside the bankruptcy proceedings, the authorities are not so harmonious. Some of the cases hold that the withdrawal of a proof of debt cannot be permitted after the same has been filed in the case and allowed,[215] and especially after leave has been granted to the creditor to amend his proof.[216] But on the other hand, there are decisions sustaining the principle that a creditor who has proved his claim in the bankruptcy may be permitted to withdraw the same, if it was made under a mistake of fact or law, pro-

[212] Maxwell v. McDaniels (C. C. A.) 195 Fed. 426, 27 Am. Bankr. Rep. 692; Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575; In re James Carothers & Co., 182 Fed. 501; In re Wilder, 101 Fed. 104; In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Clark, 5 N. B. R. 255, Fed. Cas. No. 2,806; In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Hubbard, 1 Low. 190, 1 N. B. R. 679, Fed. Cas. No. 6,813; In re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7,242; Ex parte Harwood, Crabbe, 496, Fed. Cas. No. 6,185; Ex parte Lapsley, Fed. Cas. No. 8,083; In re Hope Min. Co., 1 Sawy. 710, Fed. Cas. No. 6,681; In re Baxter, 12 Fed. 72. But see In re E. B. Havens & Co., 186 Fed. 583.

[213] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Baxter, 12 Fed. 72.

[214] In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760.

[215] In re McIntosh, 2 N. B. R. 506, Fed. Cas. No. 8,826; In re Emison, 2 N. B. R. 595, Fed. Cas. No. 4,459; In re Lowerre, 1 Ben. 406, 1 N. B. R. 74, Fed. Cas. No. 8,577. But a creditor who has proved a claim on a note may withdraw the note, by the permission of the court, on leaving a copy on file. In re Loden, 184 Fed. 965, 25 Am. Bankr. Rep. 917.

[216] In re Hallie, 7 Ben. 182, Fed. Cas. No. 5,960.

vided neither the bankrupt nor the other creditors who have proved will be injured thereby.[217] Thus a creditor who was in fact deprived of his property through the fraudulent acts of the bankrupt, of which the creditor was ignorant and which he only discovers on the examination of the bankrupt, after he has proved his claim as a general creditor, is not then estopped to withdraw his claim and demand the return of his property.[218] But the court will not grant leave to withdraw a proof merely for the purpose of allowing the creditor to continue an arrest of the bankrupt which was made before the commencement of the proceedings in bankruptcy.[219]

§ 542. **Re-Examination of Claims and Expunging.**—The bankruptcy act provides that "claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."[220] And the general orders, in execution of the foregoing provision, declare that "when the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged, or diminished, the referee may order accordingly."[221]

[217] In re Hubbard, 1 Low. 190, 1 N. B. R. 679, Fed. Cas. No. 6,813; American Sav. Bank & Trust Co. v. Munson, 93 Wash. 78, 159 Pac. 1195.

[218] In re Stewart, 178 Fed. 463, 24 Am. Bankr. Rep. 474.

[219] In re Wiener, 14 N. B. R. 218, Fed. Cas. No. 17,620.

[220] Bankruptcy Act 1898, § 57k. Also jurisdiction to "reconsider allowed or disallowed claims, and allow or disallow them," is given to the courts of bankruptcy by § 2, clause 2. But this does not apply to claims against the estate for expenses of administration, such as the charges and expenses shown on the account of a receiver appointed to take charge of the bankrupt's estate. In re Reliance Storage & Warehouse Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49. Nor does it apply to fixed liens on the real estate of the bankrupt. Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122.

[221] General Order No. 21, clause 6. See International Agr. Corp. v. Cary, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753. Under the corresponding provisions of the act of 1867 and the rules in bankruptcy, the order for the re-examination of a claim, or for reducing or expunging it, could be made only by the judge of the court of bankruptcy; this jurisdiction was not conceded to the register, unless, perhaps, in cases where no objection was interposed by the creditor. See Comstock v. Wheeler, 2 N. B. R. 561, Fed. Cas. No. 3,084; In re Loring, Holmes, 483, Fed. Cas. No. 8,512; In re Muldauer, 8 Ben. 127, Fed. Cas. No. 9,906; In re Aspinwall, 7 Ben. 154, Fed. Cas. No. 590. But an order for the re-examination of claims made by a register without objection cannot be revoked by him upon its return. Idem.

In bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they were made,[222] and reconsideration of a claim should be allowed as a general rule when asked by the trustee at any time before the estate has been closed, that being the only limitation prescribed by the statute. Yet parties in interest (that is, the trustee or other creditors) may certainly lose their right to move for the expunging of an allowed claim when they have acquiesced in it for such a length of time as to be justly chargeable with laches.[223] But a delay of a year or even more, no other facts appearing, and where no dividend has been declared, cannot be said to constitute by itself such laches as to bar the re-examination of a claim.[224] And while it would be an abuse of discretion for the court to set aside an order allowing a claim and to grant a rehearing, for the sole purpose of extending the time within which an appeal may be taken, yet such an order, like all others, is within the control of the court, and may, in its sound discretion, be set aside for good cause shown, even after the expiration of the time allowed for appeal.[225]

It is the policy of the act to do equal and exact justice between the estate of the bankrupt and the creditors. The court has ample power to investigate a claim at any stage of the proceedings, before the final closing of the estate, and to make any correction that equity and justice demand,—not only to reduce the amount of the claim if it is found to have been allowed for too large a sum, but also to increase it if, through inadvertence or mistake, it is less than by right it should be, or to allow the proofs to stand for any sum which, upon examination, is found to be actually due.[226] Consequently, when a trustee in bankruptcy is not

[222] In re Keyes, 160 Fed. 763, 20 Am. Bankr. Rep. 183.

[223] In re Pittsburg Lead & Zinc Co., 198 Fed. 316, 28 Am. Bankr. Rep. 880; In re Hinckel Brewing Co., 123 Fed. 942, 10 Am. Bankr. Rep. 484; In re Hamilton Furniture Co., 116 Fed. 115, 8 Am. Bankr. Rep. 588; In re Effinger, 184 Fed. 724, 25 Am. Bankr. Rep. 924; In re Merwin & Willoughby Co. (D. C.) 208 Fed. 293, 31 Am. Bankr. Rep. 385; In re Williams (D. C.) 224 Fed. 984, 35 Am. Bankr. Rep. 459.

[224] In re Globe Laundry, 198 Fed. 365, 28 Am. Bankr. Rep. 831; In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93.

[225] West v. W. A. McLaughlin & Co.'s Trustee, 162 Fed. 124, 20 Am. Bankr. Rep. 654.

[226] In re W. A. Paterson Co., 186 Fed. 629, 108 C. C. A. 493, 34 L. R. A. (N. S.) 31, 25 Am. Bankr. Rep. 855; In re Montgomery, 3 N. B. R. 423, Fed. Cas. No. 9,730; In re New Brunswick Carpet Co., 4 Fed. 514; Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400. See In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824. But on motion to expunge a proof of debt and establish a set-off, a personal judgment cannot be rendered against the creditor for money in his hands. In re Forbes, 5 Biss. 510, Fed. Cas. No. 4,922; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159. Where a referee's order disallowing claims in bankruptcy on the sole ground that the claims were not offered for proof within the time required was sustained on a petition for review, and shortly afterwards the Circuit Court of Appeals in another case so construed the bankruptcy act that such claims would not have

satisfied of the legality or correctness of any claim which has been proved and allowed against the estate, or desires to contest such claim in respect either to its validity or amount, the proper practice is for him to move to have it re-examined, under the provisions of the general order, and proceed as therein directed.[227] And in the first place, the proceeding should be begun by the filing of a petition by the trustee, which should be distinct and specific. But it is said that it need not allege facts which, if proved, would defeat the claim, but only facts which constitute a sufficient cause for the re-examination of it which is demanded.[228] And if the petition is faulty in this respect, the proper method of objecting to it is by motion for a more specific statement, not by motion to strike out parts of the petition.[229] The creditor whose claim is in contest should file an answer; and if he fails to do so, and does not seek or obtain an extension of the time for answering, it will be a proper case for the entry of a decree against him pro confesso, carrying the ordinary incidents and consequences of such a decree.[230]

The general order, it will be noticed, gives the right of moving for the reconsideration of a claim to the "trustee or any creditor."[231] Although the corresponding general rule under the act of 1867 was worded in the same way, it was held that a petition for the re-examination of a proved and allowed claim might be presented by the bankrupt himself, as well as by the trustee or a creditor.[232] And in view of the purpose and policy of this provision of the act, and bearing in mind that the general order, though narrower than the statute, cannot operate as a restriction upon it, there seems good reason to hold that a petition by the bankrupt himself asking for a review of a proved claim ought not to be rejected.[233] As between the trustee and the general creditors of the estate, it has been held that the trustee alone is vested with the right to

been barred, the claimants were held entitled to a rehearing, although no appeal was claimed. In re Keyes, 160 Fed. 763, 20 Am. Bankr. Rep. 183.

[227] In re Firemen's Ins. Co., 3 Biss. 462, 8 N. B. R. 123, Fed. Cas. No. 4,796. See In re Brown (D. C.) 228 Fed. 533, 35 Am. Bankr. Rep. 826.

[228] In re George Watkinson & Co., 130 Fed. 218, 12 Am. Bankr. Rep. 370; In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

[229] In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

[230] In re Docker-Foster Co., 123 Fed. 190, 10 Am. Bankr. Rep. 584; In re Lewis, Eck & Co., 153 Fed. 495, 18 Am. Bankr. Rep. 657.

[231] In the bankruptcy of a partnership, where a claim has been proved and allowed against the individual estate of a partner, the referee has jurisdiction and power, on his own motion, to disallow the claim, and then reallow it against the firm estate. Cary v. International Agr. Corp. (C. C.) 243 Fed. 475, 38 Am. Bankr. Rep. 590.

[232] In re Pease, 29 Fed. 593.

[233] In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72. Compare In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526. If the bankrupt can be estopped from disputing the validity of a claim against his estate, or from applying to have it expunged after it has been proved, by reason of his having included it in his sworn schedule of debts, no such estoppel can be claimed in favor of a purchaser of the claim who was informed by the bankrupt, before purchas-

move for the reconsideration of a claim which has been allowed, that the provision authorizing "any creditor" to do so is meant to apply only to the case where a trustee has not yet been appointed, and that, after the appointment of a trustee, such a proceeding may not be instituted by a creditor without the concurrence of the trustee.[234] Hence if any creditor is dissatisfied with the allowance of another creditor's claim, his proper course is to demand of the trustee that the latter shall move for its reconsideration. But if the trustee refuses to do so, then the creditor may apply to the court for an order requiring the trustee so to move, or for permission for the objecting creditor to move in his own name.[235] And where it appears that a claim has been properly disallowed on objections made and conducted by the creditors in their own names, who voluntarily assumed liability for costs and expenses, the order of disallowance will not be disturbed on the theory that the trustee was the only proper person to attack the claim.[236] And the right to have a claim re-examined should not be denied to creditors who clearly have an interest therein because they seek such re-examination chiefly or solely in the interest of a third party.[237]

Any objection to a claim which would have been ground for refusing to allow it will be ground for expunging it on motion. If found to be exaggerated in amount, or illegal as to a severable portion, it may be reduced in amount. But if the claim as made is disproved in form and substance, it should be wholly expunged.[238] It may be stricken out on proof that the creditor had received a fraudulent preference which had not been surrendered, whereby he was disabled from proving any part of his debt,[239] or on account of an accomplished purpose of hindering and defrauding other creditors,[240] or because, after the proof and allowance of a debt founded on a judgment, the court in which such judgment was rendered has set it aside,[241] or when the claim is shown to have been barred by the statute of limitations at the time the petition in bankruptcy was filed.[242]

ing, that the seller of the claim had no valid claim against the estate. In re Pease, 29 Fed. 593.

[234] In re Sully, 142 Fed. 895, 15 Am. Bankr. Rep. 304; In re Lewensohn, 121 Fed. 538, 57 C. C. A. 600, 9 Am. Bankr. Rep. 368. But see In re Collins, 235 Fed. 937, 37 Am. Bankr. Rep. 692.

[235] In re Mexico Hardware Co., 197 Fed. 650, 28 Am. Bankr. Rep. 736; In re Stern, 144 Fed. 956, 76 C. C. A. 10, 16 Am. Bankr. Rep. 510.

[236] In re Canton Iron & Steel Co., 197 Fed. 767, 28 Am. Bankr. Rep. 791.

[237] In re Sully, 152 Fed. 619, 81 C. C. A. 609, 18 Am. Bankr. Rep. 123.

[238] In re Mead, 14 Fed. 287.

[239] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272; In re Leland, 14 Blatchf. 240, 16 N. B. R. 505, Fed. Cas. No. 8,235.

[240] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272.

[241] In re Bruce, 6 Ben. 515, Fed. Cas. No. 2,044.

[242] In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46.

The burden of showing that a creditor's claim, duly proven according to the provisions of the statute, is founded in mistake or fraud, or otherwise is not a valid claim against the estate, rests upon the trustee or the creditor moving to have it expunged. In proving the claim as the law provides, the creditor makes a prima facie case in favor of it. The proof is not conclusive. It may be attacked. But the person who attacks it must assume the burden of proof, for the claimant is entitled to stand upon his own deposition until overcome by countervailing evidence.[243] This evidence, however, may be extracted from the creditor himself. He will be ordered to appear for examination concerning the nature and particulars of his claim, and if he does not obey, or refuses to answer questions, it is at his peril. Even though he lives in another state, this is no obstacle to the order for his appearance. For, by proving his claim, he subjects himself to the jurisdiction of the court and is thereafter bound to obey all lawful orders touching his debt. If he disobeys the order to appear and be examined, the court can deprive him of the benefit of the act by expunging his claim.[244] If the testimony of the bankrupt is desired on a motion to expunge a proved claim, it may be obtained by summoning him as a witness.[245] The referee is required to give due notice to the creditor whose claim is challenged of the time fixed for hearing the petition,[246] but there is nothing requiring him to give notice to either party of his findings and decision on the petition. That becomes a matter of record, of which a creditor who has proved a claim is bound to take notice, the same as he would, if he were a party to a suit, of the final action or judgment of the court in such suit.[247]

As against collateral attack, an order of a court of bankruptcy expunging one's claim for the list of proved and allowed claims, and excluding it from participation in the distribution, is conclusive upon the facts and issues involved.[248] And where a referee in bankruptcy makes an order expunging a claim by a creditor against the bankrupt, because the creditor had received a preference in excess of the claim, such order is res judicata as to the fact of the preference.[249] But the effect of expunging a claim, and thereby excluding the creditor from participation

[243] In re Frazin (C. C. A.) 201 Fed. 86, 29 Am. Bankr. Rep. 214; In re Pittsburg Lead & Zinc Co., 198 Fed. 516, 28 Am. Bankr. Rep. 880; In re Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69; In re Felter, 7 Fed. 904; In re Robinson, 8 Ben. 406, 14 N. B. R. 130, Fed. Cas. No. 11,938; Canby v. McLear, 13 N. B. R. 22, Fed. Cas. No. 2,378; In re Elk Valley Coal Mining Co. (D. C.) 210 Fed. 386, 31 Am. Bankr. Rep. 545.

[244] In re George Watkinson & Co., 130 Fed. 218, 12 Am. Bankr. Rep. 370; Laffoon v. Ives, 159 Fed. 861, 87 C. C. A. 41, 20 Am. Bankr. Rep. 174; In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956.

[245] Canby v. McLear, 13 N. B. R. 22, Fed. Cas. No. 2,378.

[246] In re Stoever, 105 Fed. 355, 5 Am. Bankr. Rep. 250.

[247] In re Pease, 29 Fed. 593.

[248] John Nix & Co. v. Andrews, 88 N. J. Law, 721, 96 Atl. 1012.

[249] Hartranft v. Ives, 64 Pa. Super. Ct. 338.

in the bankruptcy proceedings, is to remit him to such remedies as he may have outside the bankruptcy, and thus set him free to reduce his claim to judgment and subject to its payment such property of the bankrupt as has not been absorbed by the bankruptcy proceedings.[250]

§ 543. Review of Referee's Proceedings by Judge.—Under the former bankruptcy law it was held that the register had power to pass upon the question of the regularity and formality of the proofs, but when any question of law or fact was raised in respect to the claim, he was obliged to certify the same to the judge for decision.[251] But under the present law, the referee not only has jurisdiction in the first instance to hear objections to the proof of claims, and pass upon the question of allowing or disallowing them, but also to entertain and decide motions for their reconsideration or expunction. And the only remedy to obtain a review of his decision on such a motion lies in the court of bankruptcy.[252] And a person dissatisfied must file a petition for a review of the referee's order.[253] The matter cannot be brought into the district court for review by filing exceptions in that court.[254] Further, a person desiring a review of the order must present his petition within the time limited therefor by any rule of the court,[255] and even if no such rule applies, he must act with reasonable promptness, or he will be subject to the imputation of laches and may for that reason be barred of all relief.[256]

On such a petition for review, the burden of proof is on those who object to the referee's decision and desire its reversal.[257] And since the referee is vested with a large measure of discretion, his decision on any

[250] Andrews v. John Nix & Co., 246 U. S. 273, 38 Sup. Ct. 249, 62 L. Ed. 711, 41 Am. Bankr. Rep. 260.

[251] In re Bogert, 2 N. B. R. 435, Fed. Cas. No. 1,598; In re Clark, 6 N. B. R. 202, Fed. Cas. No. 2,808.

[252] Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901. As to procedure on finding referee's decision wrong, and remand of case for rehearing, see Moore v. Crandall (C. C. A.) 205 Fed. 689, 30 Am. Bankr. Rep. 517.

[253] In re Russell, 105 Fed. 501, 5 Am. Bankr. Rep. 566; In re Wood, 248 Fed. 246, 160 C. C. A. 324, 40 Am. Bankr. Rep. 810; Irwin v. Maple, 252 Fed. 10, 164 C. C. A. 122, 41 Am. Bankr. Rep. 532. Compare In re John A Baker Notion Co., 180 Fed. 922, 24 Am. Bankr. Rep. 808. Ordinarily a general creditor may not prosecute before the bankruptcy court a petition for review of the allowance of the claim of another creditor; only the trustee may do so. In re Mexico Hardware Co., 197 Fed. 650, 28 Am. Bankr. Rep. 736.

[254] In re Hawley, 116 Fed. 428, 8 Am. Bankr. Rep. 632. Where, after disallowing a claim, but before perfecting findings, the referee in bankruptcy died, it is proper for the district judge to direct the whole matter to be certified to him, so that it can be tried de novo. In re Wray, 233 Fed. 418, 147 C. C. A. 354, 37 Am. Bankr. Rep. 28.

[255] In re T. M. Lesher & Son, 176 Fed. 650, 25 Am. Bankr. Rep. 218; In re L. & R. Wister & Co., 237 Fed. 793, 151 C. C. A. 35, 38 Am. Bankr. Rep. 215.

[256] In re Nichols, 166 Fed. 603, 22 Am. Bankr. Rep. 216; Cary v. International Agr. Corp. (D. C.) 243 Fed. 475, 38 Am. Bankr. Rep. 590.

[257] In re Williams, 120 Fed. 542, 9 Am. Bankr. Rep. 731; In re Pittsburgh Lead & Zinc Co., 198 Fed. 316, 28 Am. Bankr. Rep. 880.

matter of fact or evidence will be entitled to at least the weight accorded to the verdict of a jury, and will not be reversed by the court unless plainly unsupported by the evidence or otherwise palpably erroneous.[258] The court, however, may of course reverse and remand if satisfied that the referee was in error. But where, in his decision to reject a claim, he ignored material legal evidence, it would not be proper for the court to allow the claim, in addition to reversing the decision of the referee; the proper procedure is to remand the claim to the referee for a new hearing.[259]

[258] Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306, 26 Am. Bankr. Rep. 385; In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700; In re Montgomery, 185 Fed. 955, 25 Am. Bankr. Rep. 431; In re Levin, 173 Fed. 119, 21 Am. Bankr. Rep. 665; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Grant, 118 Fed. 73, 9 Am. Bankr. Rep. 93; In re Stout, 109 Fed. 794, 6 Am. Bankr. Rep. 505; In re Rider, 96 Fed. 811, 3 Am. Bankr. Rep. 192; In re Charles R. Partridge Lumber Co. (D. C.) 215 Fed. 973, 33 Am. Bankr. Rep. 537; In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 35 Am. Bankr. Rep. 94; In re Miller (D. C.) 225 Fed. 331, 35 Am. Bankr. Rep. 333; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273; In re Schilling (D. C.) 251 Fed. 972; In re Anderson (D. C.) 252 Fed. 272, 41 Am. Bankr. Rep. 731; In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93; In re Petersen (D. C.) 252 Fed. 846, 40 Am. Bankr. Rep. 637.

[259] Moore v. Crandall, 205 Fed. 689, 124 C. C. A. 11, 30 Am. Bankr. Rep. 517.

CHAPTER XXVII

SET-OFF OF MUTUAL DEBTS

§ 544. Right of Set-Off in General.—The bankruptcy act provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid," provided, however, that the creditor's claim is of a nature to be provable under the act and was not purchased with a view to its use as a set-off.[1] "Stating an account" consists in the allowance or disallowance of the several claims or items, computing or striking a balance as due from one party to the other, and the agreement of the parties, express or implied, as to the correctness of such balance and the fact of its being due. If there is a disagreement between the trustee and the creditor as to the allowance of items in the mutual account, or the validity of claims, or as to the amount of the balance due, the trustee may apply to the court for leave to arbitrate or compromise the controversy,[2] or the court itself might settle the question in a summary manner or direct a suit to be brought.[3]

This provision, however, is permissive rather than mandatory,[4] and does not enlarge the doctrine of set-off and cannot be invoked in cases where the general principles of legal or equitable set-off would not authorize it.[5] The matter, moreover, is largely within the control of the

[1] Bankruptcy Act 1898, § 68. The object of this provision of the act is to give to the bankruptcy court the right to apply the principles of set-off to mutual credits when its action is invoked for that purpose. Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, 34 Am. Bankr. Rep. 723.

[2] Bankruptcy Act 1898, §§ 26, 27. Where a claim as originally filed recited that there was no counterclaim or offset to it, but it appeared that the bankrupt had a claim and a lien against property of the claimant, it was held that the claim might be amended so as to require a set-off against that of the claimant and the extinguishment of the lien. In re Progressive Wallpaper Corp. (D. C.) 240 Fed. 807, 39 Am. Bankr. Rep. 557.

[3] See In re Barnes Gear Co. (C. C. A.) 265 Fed. 597, 45 Am. Bankr. Rep. 468.

[4] In re Kyte (D. C.) 182 Fed. 166, 25 Am. Bankr. Rep. 337; Lehigh Valley Coal Sales Co. v. Maguire, 251 Fed. 581, 163 C. C. A. 575, 42 Am. Bankr. Rep. 319.

[5] Wagner v. Citizens' Bank & Trust

court of bankruptcy, its discretion in these cases being governed by the principles of equity. Thus, it may disallow a claim of a set-off against the bankrupt, when its allowance would work injustice,[6] and on the other hand, it may order a set-off where injustice would otherwise result, though an action at law could not be maintained on the claim in question.[7] Thus, where a debtor of the bankrupt who had a claim against the latter which the law would allow him to offset, mistook his legal rights in the matter and acted on incompetent advice, to the effect that the bankruptcy law would prevent any set-off, and therefore paid the entire amount of his debt to the trustee in bankruptcy, it was held that he was entitled to a return of the money so paid by him.[8] But a claim cannot be used in this way where the transaction out of which it arose was fraudulent.[9] But it must be remarked that, although the allowance of a set-off enables the particular creditor to obtain payment in full of his claim, while other creditors are only partially paid, and thus he becomes a preferred creditor, yet it is a preference growing out of the business relations of the parties as they stood at the time, and not one contrived between them, and therefore it is not obnoxious to the act.[10]

The claim proposed as a set-off, whether brought forward by the trustee or the creditor, must be in the nature of a debt or a credit. For this reason, a perfectly gratuitous expenditure of money with no expectation of repayment (as by a father for the support and education of his children) cannot be made the subject of a set-off.[11] And a payment on a note given by an insolvent to close up an existing account with a

Co., 122 Tenn. 164, 122 S. W. 245, 28 L. R. A. (N. S.) 484, 135 Am. St. Rep. 869, 19 Ann. Cas. 483; Morris v. Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Planters' Oil Co. v. Gresham (Tex. Civ. App.) 202 S. W. 145. See In re Colwell Lead Co. (D. C.) 241 Fed. 922, 39 Am. Bankr. Rep. 228.

[6] Hitchcock v. Rollo, 3 Biss. 276, Fed. Cas. No. 6,535.

[7] Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189.

[8] In re Farmers' & Mechanics' Bank (D. C.) 13 Fed. 361.

[9] McKay v. Weager (Sup.) 134 N. Y. Supp. 66. A bank which, as pledgee, had wrongfully sold property of the bankrupts at private sale for the amount of its lien, but afterwards received the profit from resales by the purchaser, which it held as its own, was held estopped, on an accounting to the trustee, to apply such sum on unsecured indebtedness of the bankrupts. Howard v. Mechanics' Bank (D. C.) 262 Fed. 699, 45 Am. Bankr. Rep. 112. Where the trustee in bankruptcy sues for the recovery of certain commissions which had been paid to the defendant in the character of a factor acting for the corporation in its business, on the ground that the factor had made secret payments out of his commissions to the president of the corporation, in violation of the penal law of the state, the factor cannot offset claims which he holds against the corporation. Palmer v. Doull Miller Co. (D. C.) 233 Fed. 309.

[10] Drake v. Rollo, 3 Biss. 273, Fed. Cas. No. 4,066. Compare In re White, 177 Fed. 194, 101 C. C. A. 364, 24 Am. Bankr. Rep. 197.

[11] Embry v. Bennett, 162 Fed. 139, 89 C. C. A. 163, 20 Am. Bankr. Rep. 651. And so of a payment made by a surety of the bankrupt, in exoneration of a default or defalcation of the bankrupt, but which the surety was under no legal obligation to make, his liability as surety having been already terminated by circumstances which he might have dis-

creditor, made within four months of the filing of his petition in bankruptcy, cannot be treated as a set-off against a new debt afterwards created by him with the same creditor, when he seeks to prove the latter in the bankruptcy proceedings.[12] So also, a creditor proving a claim against the bankrupt on an open account cannot be subjected to a set-off which would reduce or extinguish it, merely because he applied funds sent to him by the bankrupt to the satisfaction of another claim (which was secured by mortgage) instead of applying them, as the debtor directed, to the open account.[13] On similar principles, it is held that a contingent obligation or liability cannot be set off against a debt absolutely owing to the bankrupt,[14] nor a claim for unliquidated damages for a tort or a breach of contract.[15] So, a judgment obtained by a trustee in bankruptcy for a penalty incurred by the violation of a state statute against usury cannot be set off against a claim of the judgment debtor against the bankrupt estate.[16] And money or property held or due under a trust must be employed or applied according to the terms of the trust, and cannot be made the subject of a set-off as against the private debt or obligation of the trustee.[17]

But subject to these qualifications and restrictions, the set-off allowed by the statute is not confined to pecuniary demands, but embraces such claims as may or must give rise to or result in a "debt," as, for instance, where a creditor has goods of the bankrupt in his hands, which could be reached only by a suit at law or in equity.[18] So a creditor of the bankrupt who has in his possession, at the time of the bank-

covered on proper inquiry. In re Hallock (D. C.) 226 Fed. 821, 36 Am. Bankr. Rep. 92.

[12] In re Seay, 113 Fed. 969, 7 Am. Bankr. Rep. 700; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332.

[13] Stewart v. Hopkins, 30 Ohio St. 502.

[14] Abbott v. Hicks, 7 Scott, 715; In re American Paper Co., 246 Fed. 790, 159 C. C. A. 92, 41 Am. Bankr. Rep. 141.

[15] Rose v. Sims, 1 Barn. & Ad. 521; In re Becker Bros., 139 Fed. 366, 15 Am. Bankr. Rep. 228; Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, 34 Am. Bankr. Rep. 600; In re Barnes Gear Co. (D. C.) 251 Fed. 764, 42 Am. Bankr. Rep. 325; Custard v. McNary, 85 W. Va. 516, 102 S. E. 216. Compare In re Harper (D. C.) 175 Fed. 412, 23 Am. Bankr. Rep. 918. The rule is otherwise if damages for a tort or breach of contract have been liquidated. Marcus Shipping Ass'n v. Barnes, 169 Iowa, 377, 151 N. W. 525. In the bankruptcy of a stockbroker, who had been purchasing stock for customers, where the number of shares he had on hand at the time of the bankruptcy was less than required to satisfy the demands of the customers, any customer who is indebted to the broker may set off his indebtedness against the shares not recoverable. In re H. B. Hollins & Co. (D. C.) 212 Fed. 317.

[16] Wilson v. National Bank of Rolla (C. C.) 1 McCrary, 538, 3 Fed. 391.

[17] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; In re Davis, 119 Fed. 950, 9 Am. Bankr. Rep. 670; Scammon v. Kimball, 5 Biss. 431, Fed. Cas. No. 12,435; In re Troy Woolen Co., 8 N. B. R. 412, Fed. Cas. No. 14,203; In re Lane, 2 Low. 305, 13 N. B. R. 43, Fed. Cas. No. 8,043.

[18] Murray v. Riggs, 15 Johns. (N. Y.) 571; In re W. & A. Bacon Co. (D. C.) 261 Fed. 109, 44 Am. Bankr. Rep.

ruptcy, goods consigned to him by the bankrupt for sale, may sell the goods and, as against a claim for the proceeds, set off his claim against the bankrupt.[19] The value of property converted by the bankrupt may also be set off, [20] and so, perhaps, may a claim for breach of a contract, where the amount which would be recoverable is fixed and certain.[21] Thus, a claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company.[22] And where a landlord received a specified sum from the tenant for an extension of the lease for a definite period, but the lessee obtained no benefit from the extension because of his bankruptcy during the original term, in proceedings to establish claims for rent and for damages to the leased premises, the lessor must account to the estate for the sum so received.[23] A creditor having two distinct debts, and holding property in pledge for one of them, with power of sale existing at the date of the bankruptcy, may apply the surplus proceeds after paying the first debt to the discharge of the second.[24] In partnership cases, the right of set-off cannot be so applied as to run counter to the cardinal rule that firm assets are for firm creditors and the separate estates of the partners for their individual creditors. But as between the partners themselves, claims arising out of independent dealings may be offset against demands growing out of the partnership affairs.[25]

§ 545. **Meaning of Mutual Debts and Mutual Credits.**—In order that debts may be set off under this provision of the bankruptcy law, they must be mutual and must be in the same right.[26] By the term "mutual

196. Claims due the bankrupt against mortgagees who took possession of the property under an invalid foreclosure may be set off against claims of the mortgagees. Roger v. J. B. Levert Co., 237 Fed. 737, 150 C. C. A. 491, 38 Am. Bankr. Rep. 240.

19 Goodrich v. Dobson, 43 Conn. 576, Fed. Cas. No. 18,297.

20 McCabe v. Winship, 17 N. B. R. 113, Fed. Cas. No. 8,668.

21 See In re Wheeler, 2 Low. 252, Fed. Cas. No. 17,488; In re Manneschmidt, 202 Fed. 815; Clifford v. Oak Valley Mills Co. (D. C.) 229 Fed. 851, 36 Am. Bankr. Rep. 867; In re Pottier & Stymus Co. (C. C. A.) 262 Fed. 955, 44 Am. Bankr. Rep. 469; Wolins v. Wilmerding, 102 Misc. Rep. 667, 169 N. Y. Supp. 594; In re Barnes Gear Co. (D. C.) 259 Fed. 320, 44 Am. Bankr. Rep. 275.

22 Drake v. Rollo, 3 Biss. 273, 4 N. B. R. 689, Fed. Cas. No. 4,066.

23 In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590.

24 Ex parte Whiting, 2 Low. 472, 14 N. B. R. 307, Fed. Cas. No. 17,573; In re McVay, 13 Fed. 443; In re Searles, 200 Fed. 893, 29 Am. Bankr. Rep. 635.

25 In re Voetter, 4 Fed. 632; Warren v. Burnham, 32 Fed. 579.

26 In re Howe Mfg. Co. (D. C.) 193 Fed. 524, 27 Am. Bankr. Rep. 477. See In re American Paper Co. (D. C.) 243 Fed. 753, 40 Am. Bankr. Rep. 121. Trust funds are not applicable by way of set-off against a debt of the bankrupt to the person in charge of such funds, since the relation is fiduciary in the one instance and personal in the other. Alvord v. Ryan, 212 Fed. 83, 128 C. C. A. 539, 32 Am. Bankr. Rep. 1. A debt owing from a bankrupt partnership to a creditor and one owing from the creditor to an individual partner are not "mutual debts" which may be set off against each other. In re Neaderthal, 225 Fed. 38, 140 C. C. A. 364, 34 Am. Bankr. Rep. 542.

credit," as used in the rule under which courts of equity allow set-off in cases of mutual credit, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it.[27] But the term "mutual credits" in the bankruptcy law is more comprehensive than the same term as used in the equity rule or in statutes relating to the subject of set-off. The term "credit" is synonymous with "trust," and the trust or credit need not be of money on both sides. Where the creditor has goods or choses of action of the bankrupt put in his hands before the bankruptcy, by a valid contract, by the terms of which the deposit will result in a debt, as, if they are deposited for sale or collection, the case of mutual credits has arisen within the meaning of the bankruptcy law.[28] Thus, where there is a debt due on one side, and on the other a delivery of property with directions to turn it into money, the property thus delivered constitutes a "credit" within the meaning of the statute.[29] But where a bankrupt had deposited chattels with a bailee for the purpose of having certain work done upon them, and the trustee sought to recover them in an action of trover, it was held that the defendant was not entitled to retain them for his general balance for such work done by him for the bankrupt previously to the bankruptcy, for this was not a case of mutual credits.[30] So, in an action by the trustee in bankruptcy of an insolvent corporation, which carried on a livery stable, for board of defendant's horses, the latter cannot offset his personal claims against the former owner of the stable, who had conducted the business in the same name adopted by the corporation, and afterwards managed the business, since, whatever equities the defendant may have against such former owner, he has no counterclaim against the trustee.[31] Again, where a claim against a bankrupt insurance company for loss under its policies has been assigned, after notice of insolvency, the assignee cannot set it off against his previous indebtedness to the company, the debts and credits not being "mutual" within the meaning of the law.[32] So, where the trustee of a bankrupt corporation is prose-

[27] King v. King, 9 N. J. Eq. 44.

[28] Ex parte Caylus, 1 Low. 550, Fed. Cas. No. 2,534; Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096; Rose v. Hart, 8 Taunt. 499. And see Walther v. Williams Mercantile Co., 169 Fed. 270, 94 C. C. A. 546, 22 Am. Bankr. Rep. 328.

[29] Goodrich v. Dobson, 43 Conn. 576, Fed. Cas. No. 18,297. A customer of a bankrupt stockbroker is entitled to a set-off equal to the value of stock converted, and may have the value of the stock fixed as of the date of the bankruptcy. In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, 35 Am. Bankr. Rep. 213.

[30] Rose v. Hart, 8 Taunt. 499; Birdwood v. Raphael, 5 Price, 593.

[31] Davis v. Lohsen, 34 Misc. Rep. 769, 68 N. Y. Supp. 795.

[32] Hitchcock v. Rollo, 3 Biss. 276, 4 N. B. R. 690, Fed. Cas. No. 6,535. And see, as to assigned claims, Moulton v. Perkins, 116 Me. 218, 100 Atl. 1020. But compare Standard Engineering & Const. Co. v. Smyser-Royer Co., 68 Pa. Super. Ct. 437.

cuting an action against another corporation for goods sold, a creditor of the bankrupt cannot have the value of the property credited on his claim against the bankrupt, and have the action dismissed, on the contention that the goods were bought by him from the bankrupt and sold by him to the other corporation, when it appears that he was an officer of the bankrupt corporation and in charge of its sales, and at the same time an officer and agent of the purchasing corporation.[33] In another case, it appeared that a claimant ordered materials from a corporation, but another corporation which became bankrupt, intending to charge the same to the claimant, furnished the materials. The claimant, before changing his position or suffering any loss, learned of the facts and insisted on receiving the materials from the bankrupt. It was held that the claimant made himself a debtor to the bankrupt without any right to offset against the shipment any claim he had against the other corporation.[34]

§ 546. Time of Accrual of Debts or Claims.—To entitle a person to a set-off against the estate of a bankrupt, his debt or demand must be a provable one, and therefore must have been in existence at the commencement of the proceeding in bankruptcy,[35] and further, if he was not the original holder of the claim, he must have acquired it before the filing of the petition in bankruptcy.[36] Thus, for example, the mutual accounts between a bankrupt and his bank of deposit are closed by operation of law at the time when the petition in bankruptcy is filed, and no right of set-off exists in the bank as to deposits made after that time, even though neither party knew of the filing of the petition when the deposit was made.[37] So, a creditor of a bankrupt cannot obtain a preference of his debt by purchasing the property of the bankrupt through the intervention of an agent, and tendering the notes of the bankrupt in payment for the same; and in an action by the trustee to recover the value of such property, the creditor cannot set off the notes of the bankrupt.[38] But if a debt or claim constitutes a fixed and definite liability at the time of the bankruptcy, it is a provable debt, although the time for its payment has not yet arrived. Hence a debt not yet due may be set off against a debt due immediately, if it is of a provable nature.[39]

[33] In re Fort Wayne Electric Corp., 95 Fed. 264, 2 Am. Bankr. Rep. 503.

[34] In re Belleview Pipe & Foundry Co., 189 Fed. 169.

[35] Shepherd v. Turner, 3 McCord (S. C.) 249, 15 Am. Dec. 631; Smith v. Brinkerhoff, 2 Edm. Sel. Cas. (N. Y.) 369; Moore v. Third Nat. Bank, 41 Pa. Super. Ct. 497; Bramham v. Lanier Bros., 138 Tenn. 702, 200 S. W. 830.

[36] Smith v. Brinkerhoff, 8 Barb. (N. Y.) 519; Ogden v. Cowley, 2 Johns. (N. Y.) 274.

[37] In re Michaelis & Lindeman, 196 Fed. 718.

[38] Fleming v. Andrews, 9 Biss. 348, 3 Fed. 632.

[39] Ex parte Prescot, 1 Atk. 230; Ex parte Wagstaff, 13 Ves. 65; In re City Bank, 6 N. B. R. 71, Fed. Cas. No. 2,742.

Thus, notes made by the bankrupt, though not due at the time of the bankruptcy, may be used as a set-off in an action against the holder by the trustee in bankruptcy.[40] And an indorser or surety who pays the debt of his principal after the latter's bankruptcy, may claim the benefit of it as a set-off, provided his contract of indorsement or suretyship was made before the filing of the petition.[41]

§ 547. Claims Purchased With a View to Set-Off.—The bankruptcy act provides that "a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."[42] The rule was substantially the same under the act of 1867, the question turning upon the person's knowledge or notice of the fact of insolvency, or, in the case of involuntary bankruptcy, of the commission of an act of bankruptcy.[43] If this particular fact is drawn in issue, the burden is on the party claiming the right of set-off to show that he had no notice or knowledge of the insolvency of the party with whom he was dealing, and consequently no intention of using the claim in question as a set-off in the latter's bankruptcy.[44] Though this clause of the statute speaks only of claims "purchased by or transferred to" the debtor of the bankrupt, it is held that, where an indorser of the bankrupt's paper takes it up within four months prior to the bankruptcy, knowing that the bankrupt is insolvent, and for the purpose of setting it off against his debt to the bankrupt, the statute applies, and it cannot be so used.[45]

§ 548. Claims Already Filed or Proved.—Proving his claim in the bankruptcy proceedings is a waiver by the creditor of all right of action or suit against the bankrupt in respect of such claim. Hence, where the creditor proved his claim, but omitted to credit the bankrupt with a debt due to him from the creditor, and the trustee sued for such debt, it was held that the creditor could not offer the claim already proved, by way of set-off to that suit; for his doing so would be equivalent to the prosecution of an original suit for its amount, the right to which he had

[40] Frank v. Mercantile Nat. Bank, 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805.

[41] Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096; In re Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63. But compare Ex parte Hale, 3 Ves. 304.

[42] Bankruptcy Act 1898, § 68b.

[43] See Mattocks v. Lovering, 8 Fed. 212; Rollins v. Twitchell, 2 Hask. 66, 14 N. B. R. 201, Fed. Cas. No. 12,027; Mattox v. Cady, Fed. Cas. No. 9,301; Hovey v. Home Ins. Co., 10 N. B. R. 224, Fed. Cas. No. 6,743.

[44] In re Shults, 135 Fed. 623, 14 Am. Bankr. Rep. 378.

[45] Mason v. National Herkimer County Bank, 172 Fed. 529, 22 Am. Bankr. Rep. 733.

waived.[46] But there is also a decision to the effect that a creditor who has proved his claim in the bankruptcy proceedings may withdraw the same and plead it as a set-off in a suit brought against him by the trustee, and that if he is not allowed thus to plead the claim, and judgment goes against him in the trustee's suit, the court of bankruptcy, having full power over such a judgment, is bound by the statute to set off against it the claim of the creditor at its proper value.[47]

§ 549. **Joint Debts and Credits.**—Under the bankruptcy law of 1867 it was held that, where one of two joint debtors becomes bankrupt, the creditor may set off the debt against his separate indebtedness to the bankrupt.[48] But generally the courts adhered to the rule that a set-off is enforced in equity only when there are mutual debts or credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow a set-off. Hence, where a bankrupt owed a debt to two persons jointly, and held a joint note given by one of them and a third person, it was held that the two claims were not subject to set-off under the bankruptcy act, being neither mutual debts or credits.[49] So, it is now held that a solvent partnership which is indebted to a bankrupt cannot set off against such indebtedness a claim due from the bankrupt estate to one of the partners,[50] and a claim on promissory notes of a partner cannot be set off against a judgment in behalf of the firm, the debts not being in the same right.[51] So where five persons, only one of whom was solvent, had a joint claim against the estate of a bankrupt, and each of them had severally become liable to the trustee in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration for the other, it was held that there could be no set-off of such claims.[52] In the case of a person jointly liable with the bankrupt and who is also his creditor, the right may depend on whether or not the common creditor proves his claim. Thus, where the bankrupt and a person who was indebted to him were jointly liable on a promissory note to a bank, and the bank proved its claim on the note, and thereafter the bankrupt's

[46] Brown v. Farmers' Bank of Kentucky, 6 Bush (Ky.) 198; Russell v. Owen, 61 Mo. 185, 15 N. B. R. 322.

[47] Harmanson v. Bain, 1 Hughes, 391, Fed. Cas. No. 6,073.

[48] In re Carrier, 39 Fed. 193. And see Cosgrove v. Cosby, 86 Ind. 511; Tucker v. Oxley, 5 Cranch, 34, 3 L. Ed. 29.

[49] Gray v. Rollo, 18 Wall. 629, 21 L. Ed. 927.

[50] In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84.

[51] In re T. M. Lesher & Son, 176 Fed. 650, 25 Am. Bankr. Rep. 218; In re Neanderthal, 225 Fed. 38, 140 C. C. A. 364, 34 Am. Bankr. Rep. 542.

[52] In re Crystal Spring Bottling Co., 100 Fed. 265, 4 Am. Bankr. Rep. 55.

debtor took up the note, it was held that the latter could not set off against his indebtedness to the estate the moiety of the note which the bankrupt should have paid, but that, on paying his debt to the trustee, he should be subrogated to the rights of the bank as to that moiety, and entitled to receive such dividends as should be declared thereon.[53] On the other hand, where a debtor of the bankrupt paid a debt to a creditor on which he was jointly liable with the bankrupt, and the creditor to whom the payment was made had received a preference, which he had not surrendered, and therefore was not entitled to prove his claim in the bankruptcy, it was held that the debtor paying the claim was not entitled to set off the payment against his debt to the bankrupt by virtue of his right of subrogation to the rights of the creditor, since he succeeded to the creditor's disabilities as well as to his rights, but that the claim of such debtor was a "mutual credit," within the meaning of the bankruptcy act, and on that ground he was entitled to have the same set off against the claim of the bankrupt's estate against him.[54] Where part of a claim accrued to the bankrupt himself before the bankruptcy, but the remainder to his trustee after the bankruptcy, one desiring to set off a claim in his own favor must show against which portion of the trustee's claim, if any, it is available by way of set-off.[55]

§ 550. Set-Off Against Deposit Account in Bank.—A general deposit account in a bank subject to check becomes, upon the bankruptcy of the depositor, a security for, and a payment pro tanto of, his liabilities to the bank, by the operation of the law of mutual credits.[56] Hence where a bankrupt is indebted to a bank, on promissory notes or otherwise, in which he also has a balance to the credit of his general deposit account, the bank is entitled to have the one claim set off against the other, and to account to the trustee in bankruptcy only for the balance of the money on deposit after satisfying its own claims, or, if those claims exceed the amount of the bankrupt's balance, then to prove its claim for the remainder.[57] And this rule is not affected by the fact that

[53] In re Bingham, 94 Fed. 796, 2 Am. Bankr. Rep. 223.

[54] Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

[55] Howard v. Magazine & Book Co., 147 App. Div. 335, 131 N. Y. Supp. 916.

[56] Hough v. First Nat. Bank, 4 Biss. 349, Fed. Cas. No. 6,721; Ex parte Howard Nat. Bank, 2 Low. 487, 16 N. B. R. 420, Fed. Cas. No. 6,764.

[57] New York County Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Meyer, 107 Fed. 86, 5 Am. Bankr. Rep. 593; In re Kalter, 2 Nat. Bankr. News, 264; In re Petrie, 5 Ben. 110, 7 N. B. R. 332, Fed. Cas. No. 11,040; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1,483; Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306; Steinhardt v. National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23; Whitaker v. Crowder State Bank, 26 Okl. 786, 110 Pac. 776; West v. Bank of Lahoma, 16 Okl. 328, 85 Pac. 469; Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118, 30 Am. Bankr. Rep. 79; In re Wright-Dana Hardware Co., 212 Fed. 397, 129 C. C. A.

the debt to the bank, if fixed and absolute, was not due at the date of the bankruptcy,[58] as in the case of notes of the bankrupt which were discounted by the bank prior to the filing of the petition, whether matured or unmatured at the date of the adjudication in bankruptcy,[59] or where the bankrupt's liability was as an indorser of a note held by the bank, though that liability did not become absolute until after the filing of the petition.[60] And it appears that, even though the deposit account may have been transferred on the books of the bank to an assignee for creditors or a receiver, or even to the trustee in bankruptcy, yet if there has been no actual payment of the money nor any change of possession, it is not too late to claim the right of set-off.[61] And in one case it was held that where a bank, holding a note of the bankrupt and also having funds of his on deposit sufficient to satisfy it, paid over the entire fund to the trustee in bankruptcy, through oversight, without first satisfying the note, it was entitled to recover the amount of the note from the trustee in a court of equity, without first offering to satisfy the note or bringing it into court for cancellation.[62] On the same principle, if a bank, after the commencement of proceedings in bankruptcy, collects money on drafts deposited with it by the bankrupt before that time, it may apply the money towards the payment of a note of the bankrupt held by it.[63] And a firm note to a bank, assumed by an insolvent partner on the dissolution of the firm, becomes his individual indebtedness, so that such debt and the amount due to him as a depositor, independent of any partnership consideration, become mutual debts within the meaning of the bankruptcy law.[64]

73, 31 Am. Bankr. Rep. 816; Wilson v. Citizens' Trust Co. (D. C.) 233 Fed. 697, 37 Am. Bankr. Rep. 86; In re Friedman (D. C.) 241 Fed. 603, 39 Am. Bankr. Rep. 777; Chisholm v. First Nat. Bank, 269 Ill. 110, 109 N. E. 657; Conquest v. Broadway Nat. Bank, 134 Tenn. 17, 183 S. W. 160; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; Bennett v. North Philadelphia Trust Co., 66 Pa. Super. Ct. 261; Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120; In re Cross (C. C. A.) 273 Fed. 39, 46 Am. Bankr. Rep. 727.

[58] Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263, 26 Am. Bankr. Rep. 238; In re Radley Steel Const. Co. (D. C.) 212 Fed. 462; De Long v. Mechanics & Metals Nat. Bank, 168 App. Div. 525, 153 N. Y. Supp. 1010; Shields v. John Shields Const. Co., 83 N. J. Eq. 21, 89 Atl. 1022.

[59] Frank v. Mercantile Nat. Bank, 100 App. Div. 449, 91 N. Y. Supp. 488, affirmed, 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805.

[60] In re Philip Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25.

[61] In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760. But compare Pearsall v. Nassau Nat. Bank, 74 App. Div. 89, 77 N. Y. Supp. 11.

[62] Union Nat. Bank v. McKey, 102 Fed. 662, 42 C. C. A. 583.

[63] In re Farnsworth, 5 Biss. 223, 14 N. B. R. 148, Fed. Cas. No. 4,673. And see In re Northrup, 152 Fed. 763, 18 Am. Bankr. Rep. 335. But compare Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 199 Fed. 704, 118 C. C. A. 142.

[64] Hooks v. Gila Valley Bank & Trust Co., 12 Ariz. 315, 100 Pac. 806.

But a liability as indorser, where the principal is solvent, cannot be set off against a bank deposit by the indorser on his bankruptcy.[65] And where deposits are made and accepted for a special purpose, the relation of the bank and the depositor is not that of debtor and creditor, but the bank becomes the bailee of the depositor, or holds the fund under a species of trust, and in this event it cannot set off its own claims against the depositor in his bankruptcy.[66] It was so held in a case where the money was deposited under an agreement that the bankrupt should use it to pay salary checks and pay-roll checks and for certain other specified purposes,[67] and also in a case where the bank received a deposit from a customer merely for safe-keeping, the money to be ultimately appropriated for the benefit of his creditors, and the bank knew him to be insolvent.[68] So, where the treasurer of a town deposited money in a bank which failed, and town warrants paid with the bank's money were in the hands of the bank at the time of its bankruptcy, and the trustee in bankruptcy obtained the warrants, it was held that, although the town was liable to him on the warrants, no right to set-off could exist in favor of the treasurer and the sureties on his bond.[69] Again, a bank has no right to a set-off as to deposits made by the bankrupt after the actual filing of a petition against him, although neither party knew that it had been filed.[70] And where a bank claims a set-off against the claim of the bankrupt's trustee for money on deposit, its claim arising out of the bankrupt's alleged conversion of certain property of which the bank was the real owner, the claim can be adjudicated only in a plenary suit, and cannot be reached by a summary order.[71]

The converse of the main rule stated above is equally true. That is, on the bankruptcy of a bank or banker, a depositor, having a balance to the credit of his deposit account, is entitled to set off the same against a note on which he is indebted to the bank.[72]

§ 551. **Unpaid Stock Subscriptions.**—As the capital stock of a corporation (and more especially unpaid subscriptions thereto) constitutes a trust fund for the benefit of the general creditors of the corporation. it follows that a stockholder indebted to a bankrupt corporation for un-

[65] Ex parte Howard Nat. Bank, 2 Low. 487, 16 N. B. R. 420, Fed. Cas. No. 6,764.

[66] Farmers' & Merchants' State Bank v. Park, 209 Fed. 613, 126 C. C. A. 607, 31 Am. Bankr. Rep. 696.

[67] Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co., 118 C. C. A. 142, 199 Fed. 704.

[68] Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799.

[69] Town of Cicero v. Grisko, 240 Ill. 220, 88 N. E. 478.

[70] In re Michaelis & Lindeman, 196 Fed. 718.

[71] In re Boston-Cerrillos Mines Corporation, 206 Fed. 794, 30 Am. Bankr. Rep. 739.

[72] In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84; Winslow v. Bliss, 3 Lans. (N. Y.) 220; Mandel v. Koerner (Mun. Ct. N. Y.) 149 N. Y. Supp. 455.

paid shares of stock cannot set off against such liability a debt due to him from the corporation. The debts are not in reality mutual, and to allow such a set-off would enable the stockholder to turn his fiduciary relation to his own benefit and the detriment of the creditors.[73] Thus, where the trustee of a bankrupt insurance company sues a stockholder for the unpaid balance of his subscription to its capital, the latter cannot set off a claim against the company for a loss under its policy.[74] And the fact that stockholders of a bankrupt corporation are also bondholders, and as such entitled to share in the distribution of the estate, does not entitle them to set off their claims as such in a suit against them by the trustee in bankruptcy to recover unpaid subscriptions.[75] But the trustee of a bankrupt corporation may interpose as a set-off against the claim of a stockholder a claim against him for the difference between the value of property turned over by him in payment for his stock and the nominal value of the stock, and the court, in the interest of creditors, will scrutinize with care the integrity and fairness of the transaction.[76]

§ 552. **Set-Off by or Against Trustee.**—A trustee in bankruptcy, substituted as defendant in a suit begun against the bankrupt, in replevin by the plaintiff, claiming under a transfer from the bankrupt, can set up as a counterclaim his right to avoid the transfer under the Bankruptcy Act.[77] But a trustee who has paid a note of the bankrupt cannot set off the amount thereof against the claim of an accommodation maker or indorser of the note.[78] As to the right of set-off or counterclaim against the trustee, it is held that he has no other or greater rights than the bankrupt had when he became bankrupt; and hence when a third person had at that time a right as against the bankrupt to a credit, he is entitled to assert such right in a suit against him by the trustee,[79] and for the purpose of a set-off in such a suit, it is immaterial that the creditor has not proved his claim in bankruptcy, or that the year allowed for that purpose has expired.[80] So a party against whom a judg-

[73] Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Scammon v. Kimball, 5 Biss. 431, 8 N. B. R. 337, Fed. Cas. No. 12,435; In re Howe Mfg. Co., 193 Fed. 524, 27 Am. Bankr. Rep. 477; Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, 29 Am. Bankr. Rep. 346; Boatmen's Bank v. Laws, 257 Fed. 299, 168 C. C. A. 383, 43 Am. Bankr. Rep. 683; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273; Whaley v. King, 141 Tenn. 1, 206 S. W. 31; Cochran v. Monteith (Tex. Civ. App.) 221 S. W. 1055.

[74] Scammon v. Kimball, 5 Biss. 431, 8 N. B. R. 337, Fed. Cas. No. 12,435.

[75] Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254.

[76] In re Royce Dry Goods Co., 133 Fed. 100, 13 Am. Bankr. Rep. 257.

[77] Gleason v. Bush, 166 App. Div. 865, 152 N. Y. Supp. 54.

[78] In re Jules Bouy & Co. (D. C.) 244 Fed. 896, 38 Am. Bankr. Rep. 784.

[79] Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572.

[80] Norfolk & W. Ry. Co. v. Graham, 145 Fed. 809, 76 C. C. A. 385, 16 Am.

ment has been rendered in favor of the trustee may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in his favor against the bankrupt.[81] The opinion has also been advanced that the provision of the statute in relation to the set-off of mutual debts or credits is broad enough to include a liability on the part of a creditor which has accrued to a trustee in bankruptcy as such, though not to the bankrupt himself, when the creditor's claim and such liability are mutual.[82] But in an action by a trustee in bankruptcy to recover the price of certain live stock, where defendant set up as a counterclaim a demand for services rendered by him in keeping the stock before and after the time when the trustee acquired title thereto, it was held that so much of the claim as related to services rendered before the plaintiff acquired title was not a valid claim against the estate, and could not be allowed as a counterclaim, but otherwise as to so much of the claim as related to services rendered after the plaintiff acquired title to the property.[83] And so a claim based on a breach of contract by a bankrupt after the bankruptcy is not available as a counterclaim against a claim for services or materials supplied by the trustee in bankruptcy, while continuing a contract partly performed by the bankrupt, because of want of mutuality, though the claim is available as against any claim of the bankrupt set up by the trustee.[84] But a corporation which had made advances to the bankrupt to enable him to continue in the business of manufacturing staves, under an agreement that it should purchase his entire output, and which paid the full purchase price in advance, has an equitable lien superior to the rights of other creditors, even though the legal title to the property remained in the bankrupt; and hence, where the trustee adopted the contract and continued manufacturing staves under the same arrangement, the corporation cannot, at a later date, be required to pay for all of the staves turned over to it, without deduction for the advances made.[85]

§ 553. Suit to Recover Preference.—In a suit by a trustee in bankruptcy to recover an unlawful preference, the creditor will not be allowed to set off the debt in respect to which the preferential transfer of property or payment was made,[86] nor will he be entitled to credit for

Bankr. Rep. 610; Wagner v. Burnham, 224 Pa. St. 586, 73 Atl. 990.

[81] Tootle-Weakley Millinery Co. v. Billingsley, 74 Neb. 531, 105 N. W. 85.

[82] In re Crystal Spring Bottling Co., 100 Fed. 265, 4 Am. Bankr. Rep. 55.

[83] Moran v. Bogert, 3 Hun (N. Y.) 603, 14 N. B. R. 393.

[84] Howard v. Magazine & Book Co., 147 App. Div. 335, 131 N. Y. Supp. 916.

[85] Greif Bros. Cooperage Co. v. Mullinix (C. C. A.) 264 Fed. 391, 45 Am. Bankr. Rep. 265.

[86] Western Tie & Timber Co. v. Brown, 129 Fed. 728, 64 C. C. A. 256, 12 Am. Bankr. Rep. 111; Moody v. Chicago Title & Trust Co., 138 Ill. App. 233; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053; Schmidt v. Bank of Commerce, 15 N. Mex. 470, 110 Pac. 613, 33

services rendered or disbursements made in caring for or disposing of the property in question.[87] So a court of equity, in a suit by the trustee in bankruptcy to recover a preference, will not entertain a cross-bill for the recovery by the defendant of the amount of the dividend to which he claims to be entitled from the bankrupt estate, but will require him to prove his claim in the bankruptcy court, though it may permit him, on the giving of security, to retain in his hands sufficient of the amount which the complainant is entitled to recover to cover his dividend in case his claim shall be allowed.[88] Nor is this rule confined to cases in which the trustee is forced to bring suit in order to avoid the preference. It is likewise applicable where he opposes the allowance of a claim filed by a creditor, on the ground that the creditor has received a preference which he has not surrendered.[89]

L. R. A. (N. S.) 558; State Bank of Clearwater v. Ingram, 237 Fed. 76, 150 C. C. A. 278, 38 Am. Bankr. Rep. 447.

[87] Ommen v. Tallcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572.

[88] Ommen v. Tallcott, 175 Fed. 259, 23 Am. Bankr. Rep. 570.

[89] In re Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202.

CHAPTER XXVIII

SECURED CREDITORS

§ 554. Who Are Secured Creditors.—A secured creditor is defined by the bankruptcy act of 1898 as "a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets." [1] To come within this definition, therefore, the creditor must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security.[2] The latter part of the definition is important: for it was held under the former bankruptcy law that a creditor was not to be treated as "secured" merely because a surety or guarantor of the debt was protected by a lien on the bankrupt's property.[3] And to constitute a lien or security, within the meaning of the act, there must be a security additional to the personal obligation of the debtor.[4] Thus, a

[1] Bankruptcy Act 1898, § 1, cl. 23.

[2] Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135. And see In re Russell Falls Co. (D. C.) 249 Fed. 260, 41 Am. Bankr. Rep. 448. A "secured" creditor is one who directly holds as security for his debt property which would otherwise swell the assets of the bankrupt estate, or indirectly holds like property through having the debt obligation of another person who himself holds such property. In re Shatz (D. C.) 251 Fed. 351, 41 Am. Bankr. Rep. 576.

[3] In re Lloyd, 15 N. B. R. 257, Fed. Cas. No. 8,429. But compare In re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7,242.

[4] Shoemaker v. National Mechanics' Bank, 1 Hughes, 101, Fed. Cas. No. 12,801. As to the preferential right of a subcontractor to the balance of the money due the contractor from the principal,

banker has no lien upon the moneys of a depositor for any separate debt which the depositor may owe to him, and the mere fact that he holds such moneys on deposit at the time of the bankruptcy does not make him a secured creditor.[5] Further, although there may be an additional or collateral security, this does not make the creditor a secured creditor, unless the person furnishing it has a lien on assets of the bankrupt. Thus, where a firm is dissolved and one of the partners assumes payment of all the debts, this makes him a principal debtor and the other partner a surety, but it does not follow that a creditor of the partnership becomes a secured creditor.[6] So, where the bankrupt had bought goods on credit, and payment was guaranteed to the seller by a third person, the creditor is not "secured," unless the guarantor has taken security from the bankrupt.[7] So a mere promise by a subsequent purchaser of property subject to a mechanic's lien, in consideration of forbearance, to pay the demand secured by the lien, is not "collateral security" and does not discharge the lien.[8] Again, it is necessary that the security should attach to the bankrupt's "property" or "assets"; that is, there must be a lien upon property which would otherwise go into the general fund or be available for the claims of general creditors,[9] and a creditor holding security on property which never belonged to the bankrupt may prove his whole debt without first disposing of the security.[10]

But subject to these conditions, the term "security," as used in the bankruptcy act, will include every interest or right attached to or which is a charge upon specific property, or which entitles the owner thereof to be paid out of specific property, whether legal or equitable, absolute or contingent.[11] Thus, where the by-laws of a corporation provide that it shall have a lien on the stock of any shareholder for his indebtedness to the corporation, and an indebted stockholder becomes bankrupt, the corporation is a secured creditor.[12] Taxes, particularly those assessed by municipalities, may or may not attach to real property as liens, according to the local law, and upon this will depend the position of the state or municipality as a secured or unsecured creditor.[13] Again, it is im-

see Baker Lumber Co. v. A. A. Clark Co., 53 Utah, 336, 178 Pac. 764.

[5] In re Warner, 5 N. B. R. 414, Fed. Cas. No. 17,177; In re Weeks, 8 Ben. 265, 13 N. B. R. 263, Fed. Cas. No. 17,349.

[6] Schmitt v. Greenberg, 58 Misc. Rep. 570, 109 N. Y. Supp. 881.

[7] In re Anderson, 7 Biss. 233, 12 N. B. R. 502, Fed. Cas. No. 350. And see United States Fidelity & Guaranty Co. v. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. Supp. 92.

[8] Mervin v. Sherman, 9 Iowa, 331.

[9] In re Spades, 6 Biss. 448, 13 N. B. R. 72, Fed. Cas. No. 13,196.

[10] In re Dunkerson, 4 Biss. 253, 12 N. B. R. 413, Fed. Cas. No. 4,157. A bank holding the note of a third person, secured by a pledge of stock which does not belong to the bankrupt, the latter being liable thereon as an indorser, may prove its claim against the bankrupt's estate without surrendering the stock. In re Thompson, 208 Fed. 207.

[11] Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, 507.

[12] In re Morrison, 10 N. B. R. 105, Fed. Cas. No. 9,839.

[13] See In re Harvey, 122 Fed. 745, 10 Am. Bankr. Rep. 567.

portant to notice that, when property or securities are delivered to a creditor, it may be the intention and understanding of the parties that a payment and discharge of the debt shall be effected, rather than the creation of a lien, and of course, in the former case, the creditor cannot present himself in the guise of a secured creditor, though he may have been disappointed in the value of the property turned over to him.[14] And it is not permissible for the bankrupt himself, after receiving his discharge, to purchase and take an assignment to himself of debts against his own estate in bankruptcy secured by liens, and collect the same for his own use out of assets in the hands of his trustee, to the exclusion of subsequent lien holders. His purchase of his own debt operates to extinguish the debt, and this rule is not affected by the fact of his having been discharged, because the discharge does not destroy or extinguish the debt, though it bars the remedy for its recovery.[15]

§ 555. Same; Mortgagees.—The holder of a mortgage on real or personal property of the bankrupt is a secured creditor,[16] though the mortgage was not made by the bankrupt himself, but by his predecessor in the title,[17] and though it covers after-acquired property as well as that in possession at the time.[18] So, the joint note of a husband and wife secured by a deed of trust on the wife's property should be allowed as a secured claim against the estate of the husband in bankruptcy, although the wife may have died leaving heirs.[19] But it is doubtful whether a mortgage on exempt property of the bankrupt puts the mortgagee in the position of a secured creditor. Probably, however, it should be so held, since it would give him an inequitable advantage if he were allowed to realize on his security and at the same time compete with unsecured creditors.[20] Equitable mortgages, as well as legal, may come

[14] In re Black Diamond Copper Min. Co., 11 Ariz. 415, 95 Pac. 117.

[15] In re Burton (D. C.) 29 Fed. 637.

[16] Krugmeier v. Hackett, 134 Wis. 57, 113 N. W. 1103. Bondholders of a bankrupt corporation are not precluded from proving their debts as secured because of their omission to record the deed of trust securing the bonds. In re Charles Town Light & Power Co. (D. C.) 199 Fed. 846, 29 Am. Bankr. Rep. 721. A secured creditor who took the legal title to land mortgaged to secure pledged bonds, is still a pledgee or mortgagee, and only entitled to prove the excess above the security. In re J. G. Reichard & Bro. (D. C.) 230 Fed. 525.

[17] McKay v. Hamill, 185 Fed. 11, 107 C. C. A. 115, 26 Am. Bankr. Rep. 164. See In re Altenheim, 1 Ben. 431, Fed. Cas. No. 268.

[18] Barnard v. Norwich & W. R. Co., 4 Cliff. 351, 14 N. B. R. 469, Fed. Cas. No. 1,007. See In re Baker, 1 Hask. 593, Fed. Cas. No. 762. Mortgagees, until they assert their rights in the rents by proceedings to sequester them, cannot assert any rights as against the trustee in bankruptcy of the mortgagor to rents collected before such assertion, though the rents were included in the mortgage. In re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342, 37 Am. Bankr. Rep. 129.

[19] In re Hartel, 7 N. B. R. 559, Fed. Cas. No. 6,157.

[20] See In re Lantzenheimer, 124 Fed. 716, 10 Am. Bankr. Rep. 720; Fenley v. Poor, 121 Fed. 739, 58 C. C. A. 21, 10 Am.

within this rule. Thus, if no state law forbids, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money, is entitled, on the bankruptcy of the vendor without having conveyed, to prove his claim as one secured by an equitable lien on the land.[21] And so, where money is loaned or advanced under an agreement that it is to be used to discharge an incumbrance on the borrower's property, and the lender is to have a first lien to secure its repayment, and the money is so used, the lender may be subrogated to the rights of the incumbrancer whose debt was paid, against the borrower's trustee in bankruptcy.[22]

§ 556. Same; Judgment Creditors.—Ownership of a judgment against the bankrupt will constitute the creditor a "secured creditor," within the meaning of the act, provided there is property of the bankrupt upon which the judgment may attach, or has attached, as a lien.[23] But not so if the law of the state confines the lien of judgments to real property and the estate of the particular bankrupt consists wholly of personalty.[24] And in any case, where the creditor claims the rights of a secured creditor by virtue of an alleged judgment lien on the property of the estate, the burden is on him to show that he has done everything required by statute to make his judgment attach as a lien.[25] Now at common law, a judgment does not by itself constitute a lien on property of the defendant, either real or personal, nor is a lien created by the issuing of a writ of fieri facias upon such judgment; nothing but a levy upon specific property will produce that effect.[26] And when this rule is in force in the state where the proceedings are pending and where the debtor's property is situated, the docketing of a judgment against him, or the issuance of a writ thereon, will not create such a lien as will be respected and enforced by the court of bankruptcy.[27] So, where a judgment recovered before a justice of the peace is not a lien on land until docketed in the superior court, this step must have been taken before the bankruptcy, or the judgment will not constitute a security within the meaning of the bankruptcy law.[28] And the same is true of a judgment which has been allowed to become dormant, unless the statute of limitations is applicable only in favor of subsequent purchasers and judg-

Bankr. Rep. 377. Compare In re Bailey, 176 Fed. 990, 24 Am. Bankr. Rep. 201.

[21] In re Peasley, 137 Fed. 190, 14 Am. Bankr. Rep. 496.

[22] In re Lee, 182 Fed. 579, 25 Am. Bankr. Rep. 436; Dewey v. Kelton, 18 N. B. R. 217, Fed. Cas. No. 3,850.

[23] In re Cale, 182 Fed. 439, 25 Am. Bankr. Rep. 367; Guardians of Poor v. Ovens, L. R. 8 Ex. 37. See American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583.

[24] In re Erwin, 3 N. B. R. 580, Fed. Cas. No. 4,524.

[25] In re Wood, 95 Fed. 946, 2 Am. Bankr. Rep. 695.

[26] 1 Black, Judgm. §§ 397, 398.

[27] In re McIntosh, 2 N. B. R. 506, Fed. Cas. No. 8,826.

[28] In re Wood, 95 Fed. 946, 2 Am. Bankr. Rep. 695.

ment creditors, in which case, not being available in favor of the judgment debtor, it cannot be set up in favor of his trustee in bankruptcy,[29] or unless the dormant judgment has been duly revived.[30] Nor does a judgment creditor acquire a lien, which will be protected under the bankruptcy law, by commencing proceedings supplementary to execution; for until the appointment of a receiver, his right is not a lien.[31] And the same is true (at least in some states) of a judgment creditor who attacks an alleged fraudulent conveyance, but does not procure a decree setting it aside until after the bankruptcy of the debtor.[32] And it must not be understood that the creditor, even if his judgment lien is perfect, will have the right to issue and levy an execution and cause a sale of the property, after it has passed into the control of the trustee in bankruptcy. While he has the advantageous position of a secured creditor, he will not be allowed to interfere, at will, with property in the custody of the bankruptcy court.[33] But one whose judgment is a lien on property which had been sold and conveyed by the bankrupt in good faith before the bankruptcy is differently situated. He may claim and secure in the bankruptcy proceedings his portion of the estate of the bankrupt, in virtue of the debt evidenced by his judgment, without accounting or giving credit for anything on account of the lien.[34] Under the bankruptcy act of 1841, it was held that a power of attorney to confess judgment was a "security" within the meaning of that statute,[35] but it is not probable that it would be so held under the narrower terms of the present law.

§ 557. Same; Pledgees, Assignees, and Holders of Collateral.—One holding specific personal property in pledge, as a means of enforcing the payment of a debt, is a secured creditor within the bankruptcy act,[36] and so also where the pledge is of any of those various forms of intangible property which are commonly known in the business world under the general description of "collateral," such as bonds or stock of corporations, mortgages, notes, and other marketable securities.[37] The same principle applies also to one who holds a policy of insurance on the life

[29] In re Huddell, 47 Fed. 207.

[30] Appeal of Bucknor (Pa.) 4 Atl. 738.

[31] In re Wheeler, 18 N. B. R. 385, Fed. Cas. No. 17,490.

[32] In re Estes, 5 Fed. 60.

[33] Pennington v. Sale, 1 N. B. R. 572, Fed. Cas. No. 10,939; Davis v. Anderson, 6 N. B. R. 145, Fed. Cas. No. 3,623; Russel v. McCord, 2 Flip. 139, 17 N. B. R. 508, Fed. Cas. No. 12,157.

[34] McAden v. Keen, 30 Gratt. (Va.) 400.

[35] Buckingham v. McLean, 13 How. 151, 14 L. Ed. 91.

[36] In re Peebles, 2 Hughes, 394, 13 N. B. R. 149, Fed. Cas. No. 10,902.

[37] In re McVay, 13 Fed. 443; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Mitchell v. Roberts, 17 Fed. 776; Dumont v. Fry, 14 Fed. 293. "Any species of property or thing in action, which is capable of assignment, may be pledged as collateral security for the payment of a debt, by the delivery or assignment of such property. All forms of negotiable paper, such as promissory notes, bonds, and other evidences of debt may be pledged as collateral security.

of his debtor as collateral security for his debt.[38] And an assignment of a lease running to the debtor may constitute the creditor a secured creditor,[39] and so of the transfer of an order drawn on a third person,[40] or an assignment of money to become due under a contract.[41] But the holder of a warehouseman's receipt which is attached to a note executed to the warehouseman, as collateral security, is not a secured creditor in the bankruptcy of the warehouseman.[42] There may also be circumstances in which a court of bankruptcy—in view of its equitable powers and duties—would recognize a merely equitable assignment as putting the assignee in the position of a secured creditor. But it has been held that the holder of a protested draft, drawn by a bankrupt bank, is not entitled to priority of payment over other creditors of the bank, merely because the drawee (another bank) may have had funds of the drawer in its hands at the time it refused to accept the draft. "If it were assumed or conceded that under any circumstances such a draft can amount to an equitable assignment in favor of the payee of that amount of the drawer's funds in the hands of the drawee, such a principle cannot be applied where it would contravene the purpose of the bankruptcy act." [43]

§ 558. **Same; Holders of Notes.**—A promissory note is not a security for the payment of a debt, but only an evidence of the debt.[44] And although it may be indorsed, this does not make the claim a secured one,[45] unless, under the terms of the statute, the indorser holds a security on the property of the bankrupt. But the opinion has been advanced that a creditor who holds a note of the bankrupt containing a waiver of exemptions is in the position of a secured creditor, since his

Other evidences of debt, negotiable or quasi-negotiable, may be pledged in accordance with the usuages or customs of the commercial world, or pursuant to statutory enactments. Thus, by custom or usage, where statutory enactments do not prohibit it, corporate stock, mortgages securing promissory notes, and warehouse receipts or bills of lading may be pledged as collateral security." Colebrooke, Collat. Sec. (2d Ed.) § 2a.

[38] Burlingham v. Crouse, 181 Fed. 479, 24 Am. Bankr. Rep. 632; In re Mertens, 134 Fed. 101, 14 Am. Bankr. Rep. 226; In re Newland, 6 Ben. 342, 7 N. B. R. 477, Fed. Cas. No. 10,170; In re Shoenberger, Fed. Cas. No. 12,802.

[39] Fitch v. Richardson, 147 Fed. 197, 77 C. C. A. 423, 16 Am. Bankr. Rep. 835.

[40] In re Hines, 144 Fed. 54, 16 Am. Bankr. Rep. 495.

[41] In re De Long Furniture Co., 188 Fed. 686, 26 Am. Bankr. Rep. 469.

[42] State v. Federal Union Surety Co., 156 Mo. App. 603, 137 S. W. 613.

[43] Bank of Commerce v. Russell, 2 Dill. 215, Fed. Cas. No. 884.

[44] United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119.

[45] In re Broich, 7 Biss. 303, 15 N. B. R. 11, Fed. Cas. No. 1,921. A creditor holding the bankrupt's indorsed note for part of his claim is not therefore a "secured" creditor, and he is entitled to a dividend on the full claim though the indorser paid the note after the proofs of claim were filed. Young v. Gordon, 219 Fed. 168, 135 C. C. A. 66.

right to resort to the exempt property is in the nature of a security, if not a lien.[46]

§ 559. Effect of Additional Security or Claim Against Third Person.—The bankruptcy act provides that "the liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."[47] And it is a general rule that if a creditor of the bankrupt holds security in the form of any obligation of a third person whether it be a mortgage or pledge of property, an indorsement, or a contract of suretyship or guaranty, provided only that the third person does not hold counter-security, the creditor may prove his debt in the bankruptcy without surrendering the security, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, that he does not take, under the bankruptcy and the security, more than the full amount of his debt.[48] The reason is that the enforcement of the security in this case does not diminish the estate of the bankrupt to which the general or unsecured creditors must look for satisfaction, and moreover, the court of bankruptcy would have no authority to interfere between the creditor and the third person, the latter being a stranger to the bankruptcy proceedings.[49] So, if a judgment is recovered against two co-defendants, and execution thereon is levied on the property of one of them, and the other is adjudged bankrupt, the judgment creditor may prove his claim against the bankrupt as unsecured.[50] And a creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners upon his claim against the partnership estate.[51] The rule is the same where the creditor is additionally secured by the undertaking of a third person to guaranty the performance of the bankrupt's contract

[46] In re Meredith, 144 Fed. 230, 16 Am. Bankr. Rep. 331.

[47] Bankruptcy Act 1898, § 16.

[48] In re Babcock, 3 Story, 393, Fed. Cas. No. 696; In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886; In re Beaver Knitting Mills, 154 Fed. 320, 83 C. C. A. 240, 18 Am. Bankr. Rep. 528; In re Otto F. Lange Co., 170 Fed. 114, 22 Am. Bankr. Rep. 414; In re Kinne, 5 Fed. 59; In re Sauthoff, 7 Biss. 167, 14 N. B. R. 364, Fed. Cas. No. 12,379; In re Myer, 14 N. Mex. 246, 89 Pac. 246. Where a creditor whose claim against the bankrupt was secured by a chattel mortgage on property of the bankrupt's wife, made full disclosure as to his security in the bankruptcy proceedings, and the bankrupt in effect denied any interest in the mortgaged property, the proving of the claim against the bankrupt and the receipt of a dividend thereon did not constitute a waiver of the mortgage. P. Ballantine & Sons v. Fenn, 88 Vt. 166, 92 Atl. 3.

[49] In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886.

[50] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272.

[51] In re Mertens, 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362. A corporation which proves an unsecured claim against a bankrupt partnership, of which one of its stockholders is a member, does not thereby waive any lien it may have on the stock of that partner. Bank of Searcy v. Merchants' Grocer Co., 123 Ark. 403, 185 S. W. 806.

or to be surety for him. The creditor loses none of his rights or remedies against the surety by proving his debt in the bankruptcy proceedings and participating in the distribution of the estate.[52] And the surety upon a promissory note is liable in an action on the note, although the principal has been adjudged a bankrupt and the note has been filed by the payee in the bankruptcy proceedings.[53] And on the other hand, where the bankrupt was indorser on a note, and his liability has become fixed and absolute, the creditor holding the note may prove its full amount against him, notwithstanding the primary liability of the maker of the note, and even though he holds a mortgage on the latter's property, to secure it, which has not been foreclosed and which he does not surrender.[54] And where both the maker and indorser of a note are in bankruptcy, the holder may prove the amount of the note as a claim against each, and receive dividends from both estates, up to the full amount of his debt.[55] But a creditor holding a note of the bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him.[56] But in all these cases, the person who is secondarily liable for the bankrupt has an interest and an equity to have the estate of the bankrupt applied as far as it will go towards the satisfaction of the debt. Thus, where a mortgage was made by the bankrupt to secure the mortgagee as a surety for him, it was held that the mortgagee was not entitled to be paid personally the amounts of the debts for which he was surety out of the bankrupt's estate, but was entitled to have such debts paid to the creditors out of the proceeds of the mortgaged property, and to be released from his liability as surety.[57]

§ 560. **Joinder in Petition and Rights at Creditors' Meetings.**—Secured creditors may join in a petition in involuntary bankruptcy, but in making up the required jurisdictional amount ($500), such creditors are to be counted only to the extent of the excess of the claim over the value of the security held for it.[58] Under the act of 1867, it was held that the act of a secured creditor in joining in the petition without any

[52] In re Levy, 2 Ben. 169, 1 N. B. R. 327, Fed. Cas. No. 8,297; Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135; Vette v. J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

[53] Gregg v. Wilson, 50 Ind. 490, 15 N. B. R. 142.

[54] In re Cram, 1 Hask. 89, 1 N. B. R. 504, Fed. Cas. No. 3,343; Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135.

[55] National Mt. Wollaston Bank v. Porter, 122 Mass. 308.

[56] First Nat. Bank v. Eason, 149 Fed. 204, 79 C. C. A. 162, 17 Am. Bankr. Rep. 593.

[57] In re Randolph, 187 Fed. 186, 26 Am. Bankr. Rep. 623.

[58] Bankruptcy Act 1898, § 59b. Further as to the right of secured creditors to join in the petition for adjudication in bankruptcy, see supra, § 153.

mention of the security which he held amounted to a waiver of it.[59] But this was on the theory that under the terms of that statute, only unsecured creditors had the privilege of petitioning in bankruptcy, whereas the present act directly contemplates the joinder of secured creditors, by providing that they may be counted only to the extent that the security is deficient. It is also the right of secured creditors to vote at creditors' meetings, and they may be counted in computing the number and amount of creditors required for any action, but only when the amount of their claims exceeds the value of the security, and then only for such excess.[60] It is also provided that "claims of secured creditors may be allowed, to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities, but shall be allowed for such sums only as shall to the courts seem to be owing over and above the value of their securities."[61] Where a partnership creditor holds securities on both the property of the partnership and the individual property of one of the partners (the firm and all its members being in bankruptcy together), the value of the security on the individual property of the partner need not be deducted in ascertaining the voting power of the creditor, but only the value of the security on the firm property.[62] But a mortgage creditor who, after the adjudication, sells the mortgaged premises, and himself becomes the purchaser, cannot vote on the deficiency as an unsecured creditor.[63]

§ 561. **Proof of Claim as Secured.**—Proof of claim by a secured creditor differs from that to be made by an unsecured creditor only in that the former must specify "what securities are held therefor."[64] If a creditor in this position wishes to participate in the bankruptcy proceedings at all, he must make himself a party by filing a proof of his claim, according to the requirements of the statute, disclosing the particular nature of the security which he holds.[65] But it is to be noted that a creditor is "secured" only when he holds a security on property of the bankrupt, or when a person secondarily liable for the bankrupt, in respect to the debt in question, holds such security on the bankrupt's assets. Hence when the creditor holds a mortgage or pledge on property belonging to a third person (the latter not having counter-security) he

[59] In re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1,562; In re Broich, 7 Biss. 303, 15 N. B. R. 11, Fed. Cas. No. 1,921; In re Bear, 5 Fed. 53.

[60] Bankruptcy Act 1898, § 56b. And see supra, §§ 277, 288.

[61] Bankruptcy Act 1898, § 57e.

[62] In re Coe, Powers & Co., 1 Nat. Bankr. News, 294.

[63] In re Hunt, 17 N. B. R. 205, Fed. Cas. No. 6,884.

[64] Bankruptcy Act 1898, § 57a. For the manner of proving a secured debt, in person or by agent, see Official Forms Nos. 32 and 36.

[65] In re Bridgman, 1 N. B. R. 312, Fed. Cas. No. 1,866.

is not bound to disclose or mention it in his proof of debt.[66] When a creditor thus proves his debt as secured, he does not waive, abandon, or surrender the security, or in any way relinquish or prejudice his rights under it. On the contrary, this is the proper method of claiming and preserving his security.[67] "It is well settled that a creditor holding security for a debt does not in any manner prejudice his claim to the security he holds by proving his debt as a debt with security, and setting out in his proof the particulars of the security and its estimated value. He does not, by such a form of proof, release his security, and prove his debt as an unsecured debt. On the contrary, such a form of proof insists on and maintains the security."[68] And moreover, as an adjudication of bankruptcy brings the assets of the bankrupt into the custody of the court of bankruptcy for administration, a creditor of the bankrupt having a lien on such property, at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim as the bankruptcy law directs.[69] But if any other creditor is interested in objecting to the claim of the proving creditor to an alleged security, or avers that the lien claimed is invalid under the laws of the state or is a voidable preference, or otherwise should not be allowed, it is within the jurisdiction of the court of bankruptcy or the referee (and it is the proper practice) to determine whether the claim is a secured or an unsecured claim, so far as concerns its allowance as such, though such a determination will not have the effect to deprive the creditor of his lien, if he has one, for that question can be decided only in a proper action or proceeding brought by the trustee in bankruptcy, and not on a summary hearing.[70] But the claim of a broader lien than the facts warrant will not affect the actual lien of the creditor.[71] And where a mortgage is made in good faith, prior to the commencement of the proceedings against the mortgagor, a mistake

[66] Merchants' & Farmers' State Bank v. Sheridan, 156 Ill. App. 25. And see supra, § 560.

[67] In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769; Bucknam v. Dunn, 2 Hask. 215, 16 N. B. R. 470, Fed. Cas. No. 2,096; In re Bolton, 2 Ben. 189, 1 N. B. R. 370, Fed. Cas. No. 1,614; Kohout v. Chaloupka, 69 Neb. 677, 96 N. W. 173; Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39. A creditor of a bankrupt corporation whose debt is secured by a valid pledge of its mortgage bonds is not required to prove his claim as a general creditor to entitle him to have his bonds participate in the mortgage fund. Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 436, 34 Am. Bankr. Rep. 510.

[68] In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830.

[69] In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437.

[70] In re Quinn, 165 Fed. 144, 21 Am. Bankr. Rep. 264; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Braselton, 169 Fed. 960, 22 Am. Bankr. Rep. 419; In re Harrison, 2 Nat. Bankr. News, 541.

[71] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

in the description of the premises in such mortgage may be corrected as against the trustee in bankruptcy to the same extent as would have been allowed against the mortgagor.[72] But where a mortgage given by the bankrupt secures a certain note only, and not an open account, an agreement that the account should also be covered by the mortgage cannot be implied.[73] Finally, it must be remembered that mortgagees who prove their debts in the bankruptcy proceedings become creditors of the mortgagor's general estate only for the balance of the debt remaining after deducting the value of the mortgaged property.[74]

§ 562. Waiver of Security and Proof of Debt as Unsecured.—A secured creditor will not be allowed to prove his entire claim against the estate in bankruptcy without surrendering or abandoning the security.[75] But on the other hand, he cannot be required, at the instance of other creditors, to rely upon his security and prove only for the deficiency, if any. He has the option to prove his debt as unsecured.[76] The latter course, entitling him to share with others in the distribution of the general estate, may be advantageous to him, and will be permitted, if his lien is not such as can be enforced against other creditors, for want of record or otherwise,[77] or even after its validity has been attacked or decided adversely to him.[78] But if the creditor has accepted a conveyance of property in lieu of his secured claim, it is then too late for him to prove his claim in the bankruptcy proceedings or have the value of his security determined.[79] It is also a general rule that if a creditor proves the whole amount of his claim, and particularly if he accepts a dividend thereon, it places him on a par with all the general creditors, and is deemed a waiver and relinquishment of any security which he may

[72] Schultze v. Bolting, 8 Biss. 174, 17 N. B. R. 167, Fed. Cas. No. 12,489.

[73] In re Johnson, 125 Fed. 838, 11 Am. Bankr. Rep. 138.

[74] McHenry v. Société Française, 95 U. S. 58, 24 L. Ed. 370; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681.

[75] In re Norris, 2 Hask. 74, Fed. Cas. No. 10,303; In re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7,240; In re Granger, 8 N. B. R. 30, Fed. Cas. No. 5,684; In re High, 3 N. B. R. 191, Fed. Cas. No. 6,473; In re Holbrook, 2 Low. 259, Fed. Cas. No. 6,588.

[76] In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159; In re Interborough Realty Co., 223 Fed. 646, 139 C. C. A. 300, 34 Am. Bankr. Rep. 541.

[77] Post v. Berry, 175 Fed. 564, 23 Am. Bankr. Rep. 699; In re Burlage Bros., 169 Fed. 1006, 22 Am. Bankr. Rep. 410.

[78] McAleer v. People's Bank, 202 Ala. 256, 80 South. 94; In re Vogt (D. C.) 188 Fed. 764; In re Moyer (D. C.) 97 Fed. 324.

[79] In re M. I. Hibbler Mach. Supply Co. (D. C.) 192 Fed. 741, 27 Am. Bankr. Rep. 612. See Beal-Burrow Dry Goods Co. v. Talburt, 139 Ark. 113, 213 S. W. 20. Where plaintiff had a negotiated note given it by defendant and sent him a check with the notation "To be used in part renewal of note," proving up in bankruptcy the note, which had not been taken up as directed, did not extinguish plaintiff's claim for the amount of the check. R. S. Howard Co. v. International Bank of St. Louis, 198 Mo. App. 284, 200 S. W. 91.

have held.[80] But a creditor cannot be deprived of the benefit of a lien by the unauthorized filing of his claim as an unsecured debt.[81] And there is no presumption on appeal that he intentionally omitted to disclose the existence of his security, and thereby waived it.[82] Nor will such a waiver be inferred from doubtful or inexplicit terms in the statement of proof. Thus, if the proof shows that the debt in question has been reduced to judgment and that the judgment is in force, but omits to state that the judgment is a lien upon real estate (such being the fact) it does not amount to a proof of the debt as unsecured with a consequent waiver of the lien.[83] If the trustee in bankruptcy does not choose to take advantage of such a waiver of security, probably the other creditors may insist upon it, but not a subsequent mortgagee who has not proved his debt in the bankruptcy proceedings,[84] and certainly not the bankrupt himself.[85] And if the holder of a note, the indorser of which is secured by a mortgage, proves the note as unsecured, the mortgage is not thereby extinguished, but the trustee in bankruptcy will be subrogated to the rights of the holder.[86]

§ 563. Same; Amendment of Proof to Claim Security.—If a secured creditor proves his claim as unsecured, but does so through mistake or inadvertence or ignorance of his legal rights, and without being aware of the effect which such a course may have as a waiver or abandonment of his security, he should not be compelled to forego the benefit of the security and participate as a general creditor, but it is in the discretion of the court to permit him to withdraw his proof and rely upon the security, or to amend the proof by stating the fact and the particulars of the security, and this permission will ordinarily be granted where

[80] In re Burr Mfg. & Supply Co., 217 Fed. 16, 133 C. C. A. 126; United States Trust Co. v. Gordon, 216 Fed. 929, 133 C. C. A. 117, 33 Am. Bankr. Rep. 300; In re Luber (D. C.) 261 Fed. 221, 44 Am. Bankr. Rep. 292; First Nat. Bank of Waterloo v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092; In re Fisk & Robinson, 185 Fed. 974; White v. Crawford, 9 Fed. 371; In re Spring, 2 Nat. Bankr. News, 509; Merchants' Nat. Bank v. Comstock, 55 N. Y. 24, 14 Am. Rep. 168, 11 N. B. R. 235; Jones v. Hawkins, 60 Ga. 52; Heard v. Jones, 56 Ga. 271, 15 N. B. R. 402; Shorten v. Booth, 32 La. Ann. 397; In re Meyers, 2 Ben. 424, 1 N. B. R. 581, Fed. Cas. No. 9,518; Wallace v. Conrad, 3 Brewst. (Pa.) 329, 3 N. B. R. 41; Ex parte Morris, 2 Low. 424, 16 N. B. R. 572, Fed. Cas. No. 9,823. Compare McAlpin v. Lee, 57 Ga. 281; Johnson v. Worden, 47 Vt. 457, 13 N. B. R. 335. But where a creditor having an aggregate claim, made up of several items, for one or more of which, but not all, he has a lien on assets of the estate in bankruptcy, receives a dividend on the whole amount of his claim, this does not estop him from afterwards asserting the lien. Brown Bros. Co. v. Smith Bros. Co. (D. C.) 231 Fed. 475, 37 Am. Bankr. Rep. 30.

[81] In re Bear (D. C.) 8 Fed. 429.

[82] Hatch v. Seeley, 37 Iowa, 493, 13 N. B. R. 380.

[83] Sedgwick v. Stewart, 9 Ben. 433, Fed. Cas. No. 12,625.

[84] Cook v. Farrington, 104 Mass. 212.

[85] Starks v. Curd, 88 Ky. 164, 10 S. W. 419.

[86] Hiscock v. Jaycox, 12 N. B. R. 507, Fed. Cas. No. 6,531.

no fraud appears and no one else will be prejudiced in his rights.[87] But the rule is more strict when the proceedings have advanced so far that a dividend has been declared and the creditor has received his share of it. Here it is said that an amendment will be allowed only in case of mistake or ignorance, and in the absence of all fraud, and where all persons can be placed in statu quo, and the creditor seeking to amend must refund a proportional part of the dividend, and pay the costs of his application.[88]

§ 564. **Settling Value of Security.**—"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance." [89] This statutory rule applies where a creditor claims a lien on property which has been set apart to the bankrupt as exempt.[90] Jurisdiction is vested in the bankruptcy court to liquidate liens on the bankrupt's estate, and to determine, in the exercise of a sound discretion, in what manner disputes as to the value of securities shall be settled.[91] And if a

[87] In re Weaver, 144 Fed. 229, 16 Am. Bankr. Rep. 265; In re Wilder, 101 Fed. 104; In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Friedman, 1 Nat. Bankr. News, 208; In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Bear, 8 Fed. 429; In re Van Buren, 2 Fed. 643; In re Brand, 2 Hughes, 334, 3 N. B. R. 324, Fed. Cas. No. 1,809; Ex parte Harwood, Crabbe, 496, Fed. Cas. No. 6,185; In re McConnell, 9 N. B. R. 387, Fed. Cas. No. 8,712; Ex parte Lapsley, Fed. Cas. No. 8,083; Phillips v. Bowdoin, 52 Ga. 544, 14 N. B. R. 43; Britton v. Thomas, 238 Fed. 125, 151 C. C. A. 201, 38 Am. Bankr. Rep. 499.

[88] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Kaufman, 8 Ben. 394, Fed. Cas. No. 7,626.

[89] Bankruptcy Act 1898, § 57h. Officers of a corporation who were sureties for it, and who paid the obligation and received the bonds which had been given as collateral security therefor, can claim on the bonds, in the bankruptcy of the corporation, only the amount paid by them, and not the face value of the bonds, the latter sum being much greater. Sauve v. Fleschutz, 219 Fed. 542, 135 C. C. A. 310, 34 Am. Bankr. Rep. 49. But see In re Anger Baking Co., 228 Fed. 181, 142 C. C. A. 537, 36 Am. Bankr. Rep. 261, holding that a pledgee of notes of a bankrupt may prove for their full amount, although the debt secured is less, where that is necessary to cover his claim. And where indorsers of the bankrupt's notes paid them, they are entitled to prove, as against the bankrupt's estate, the face value of the notes, regardless of any amount they may have received on foreclosure of a security mortgage, applying the proceeds on the balance of the claim. In re Astoroga Paper Co. (D. C.) 234 Fed. 792, 37 Am. Bankr. Rep. 751. The value of collateral deposited by a bankrupt to secure a note is the amount realized from the sale of such collateral, where the creditor has disposed of it, and not the value of the collateral at the time of the filing of the petition in bankruptcy, where that was much less. In re Isaacs, 246 Fed. 820, 159 C. C. A. 122, 40 Am. Bankr. Rep. 468.

[90] In re Little (D. C.) 110 Fed. 621, 6 Am. Bankr. Rep. 681.

[91] In re Addison, 3 Hughes, 430, Fed. Cas. No. 76; In re Winn, 1 N. B. R. 499, Fed. Cas. No. 17,876.

creditor voluntarily appears in the court of bankruptcy and asks the aid of the court for the enforcement of a lien which he claims on the bankrupt's property, the court thereby acquires jurisdiction to proceed and dispose of the whole matter in a summary way.[92] The intention of the statute seems to be that, if the creditor does not desire to foreclose his lien or realize on the security held, and the trustee does not deem it advantageous for the estate to take the matter out of his hands and force a foreclosure, they shall endeavor to agree upon a valuation of the security, and may, if the court so directs, submit the matter to arbitration. But if they cannot agree, the creditor has the right to have the valuation fixed by litigation before the referee.[93] Or if the trustee has received or collected securities pledged, the court may, on petition of the pledgee, direct the trustee to apply the proceeds for the benefit of the pledgee.[94] Or if the parties have agreed on a valuation of the security, and thereafter new facts are developed or occur, which show the valuation to have been erroneous, the court may order a new valuation to be made, if such a course is manifestly in furtherance of justice and the rights of the parties in interest.[95] Ordinarily, no steps will be taken towards compelling the valuation and application of a security until a trustee of the estate has been appointed, since the general creditors are to be represented by that officer, and it may be important for him to exercise his judgment as to the best manner of dealing with the situation.[96] Much may depend, in such cases, upon the sound discretion of the trustee. But his duty is only to the general or unsecured creditors. Hence if a particular piece of property will be wholly absorbed in satisfying an established first lien on it, the trustee is under no duty to ascertain the validity of subsequent liens.[97] But if it becomes necessary for him to carry the matter into the courts, he may file a bill against all incumbrancers, with the object of ascertaining the validity, priority, and amount of their several claims.[98] And in one case, where the creditor relied on the lien of a judgment, but it was represented to the trustee that the bankrupt was insane at the time of the service of process in the suit and at the date of the judgment, it was held that this, if true, was matter of fact which would render the judgment erroneous, and that the trustee should go into the court where it was rendered and sue out a writ of error coram nobis.[99]

[92] In re Worthington, 14 N. B. R. 388, Fed. Cas. No. 18,052.

[93] In re Davison, 179 Fed. 750, 24 Am. Bankr. Rep. 460.

[94] In re Wiley, 4 Biss. 171, Fed. Cas. No. 17,655.

[95] In re Newland, 7 Ben. 63, 9 N. B. R. 62, Fed. Cas. No. 10,171.

[96] In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830.

[97] Mattocks v. Farrington, 2 Hask. 331, Fed. Cas. No. 9,298.

[98] McLean v. Lafayette Bank, 3 McLean, 415, Fed. Cas. No. 8,886.

[99] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

The manner of valuing and applying the security must depend in many cases on the particular circumstances present, the object being always to effect exact justice as between the secured creditor, on the one hand, and the body of unsecured creditors on the other hand. For instance, in one case it appeared that the creditor, after the adjudication of his debtor in bankruptcy, took out a policy of insurance on the life of the debtor as security for the debt, and paid all the premiums with his own money. He also proved his debt in bankruptcy and received dividends thereon. The bankrupt died prior to the declaration of the last dividend, and the insurance company paid the creditor in full the original amount of the debt. It was held that the creditor must pay to the trustee in bankruptcy the whole amount received from the insurance company over the sum sufficient, with the dividends and payments previously made, to pay the debt in full, but that he was entitled also to deduct the amount of premiums paid by him, with interest from the time of payment.[100]

In regard to the costs and expenses of realizing on securities, the creditor should not ordinarily be charged with more than he would have had to expend if he had effected a foreclosure independently of the bankruptcy proceedings. But on the other hand, the estate in bankruptcy should not be burdened with expense where it gains no corresponding advantage. Thus, where a mortgage creditor attempted to foreclose his mortgage in a state court, but without leave of the bankruptcy court and without joining the trustee, and the proceeding was held invalid, it was considered that attorneys' commissions and costs stipulated to be paid on foreclosure should not be allowed.[101] But a mortgagee in possession is not chargeable with any part of the costs in bankruptcy, nor with the expenses of the sale of any of the property other than that on which his mortgage was a valid lien.[102]

§ 565. Claim for Deficiency and for Interest and Costs.—If the security held by a lien creditor is valued by agreement between himself and the trustee, or under the direction of the court, but the valuation is less than the amount of his debt or claim,—or if the lien is foreclosed or the security otherwise realized, and results in a deficiency,—the creditor, in either case, will be entitled to prove a claim in the bankruptcy proceedings for such deficiency or unsatisfied balance,[103] al-

[100] In re Newland, 7 Ben. 63, 9 N. B. R. 62, Fed. Cas. No. 10,171.

[101] In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3,847.

[102] In re Eldridge, 2 Biss. 362, 4 N. B. R. 498, Fed. Cas. No. 4,330.

[103] McHenry v. Société Française, 95 U. S. 58, 24 L. Ed. 370; In re Rudd, 180 Fed. 312, 25 Am. Bankr. Rep. 35; In re Ball, 123 Fed. 164, 10 Am. Bankr. Rep. 564; In re Linforth, 87 Fed. 386; In re Letchworth, 18 Fed. 822; In re Winn, 1 N. B. R. 499, Fed. Cas. No. 17,876; In re Bolton, 2 Ben. 189, 1 N. B.

though, quoad hoc, he will not be entitled to any preference or advantage over other creditors, but simply to take his proportionate share out of the bankrupt's general assets.[104] Further, if a mortgagee forecloses within a year after the adjudication in bankruptcy, he cannot prove his claim for a deficiency after the expiration of such year, as he had the right to prove it in the first instance as a secured claim.[105] And as to his right to obtain and enforce a deficiency decree in the foreclosure proceeding, that right will be suspended pending the bankrupt's application for a discharge, and will be lost if the discharge is granted.[106] If the property is sold on foreclosure proceedings and is bid in by the lien creditor for a merely nominal sum, with no competing bid against him, or, according to some of the authorities, if his successful bid is less than the amount due, the actual value of the property may be inquired into, and he will be allowed to prove a claim, as on a deficiency, only for the difference between the amount of his original debt and the value so ascertained.[107] And some of the cases rule that a mortgagee cannot be permitted to come upon the estate for any deficiency where he proceeded to foreclose in a state court without obtaining leave of the bankruptcy court and without making the trustee a party, as this amounts to an election on his part to rely wholly on his security and stay out of the bankruptcy.[108] But other cases hold that such a claim may be allowed in

R. 370, Fed. Cas. No. 1,614; In re Grant, Fed. Cas. No. 5,690; Ex parte Dalby, 1 Low. 431, 3 N. B. R. 731, Fed. Cas. No. 3,540; In re Ruehle, 2 N. B. R. 577, Fed. Cas. No. 12,113; Watkins v. Worthington, 2 Bland. (Md.) 509; In re Clark Realty Co., 253 Fed. 938, 166 C. C. A. 38, 42 Am. Bankr. Rep. 403; In re Progressive Wall Paper Corp. (D. C.) 224 Fed. 143; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519; In re Bash (D. C.) 245 Fed. 808, 40 Am. Bankr. Rep. 341. A creditor of a bankrupt corporation holding its notes secured by its mortgage bonds as collateral, after realizing from the mortgaged property, cannot prove against the general estate both the balance due on the notes and the balance due on the bonds, but is entitled to dividends only on the amount of the actual indebtedness to him. In re Battle Island Paper Co. (D. C.) 259 Fed. 921, 44 Am. Bankr Rep. 240.

[104] In re Snedaker (Utah) 4 N. B. R. 168.

[105] In re Sampter, 170 Fed. 938, 96 C. C. A. 98, 22 Am. Bankr. Rep. 357.

[106] Scott v. Ellery, 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050.

[107] In re Dix, 176 Fed. 582, 23 Am. Bankr. Rep. 889; In re Graves, 182 Fed. 443, 25 Am. Bankr. Rep. 372; In re Woods, 7 Fed. 665. In the case last cited, it was said that the amount of the proceeds of a subsequent sale of the property by the creditor is no test of the actual value of the property and should not be credited as such to the bankrupt, in the absence of an agreement between the parties that the creditor should sell the property and apply the proceeds towards the satisfaction of the debt. Upon a claim for the balance of a secured debt after sale of the security, the court of bankruptcy, in the absence of a legal rule in the state making the sum for which the property is bought in at a public sale conclusive of its value, is bound to consider the question of value on an allegation that the price realized at such a sale was inadequate. In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[108] In re Soltmann, 249 Fed. 455, 161 C. C. A. 413, 41 Am. Bankr. Rep. 42; In re A. J. Ellis, Inc. (D. C.) 242 Fed. 156, 39 Am. Bankr. Rep. 265; In re Astoroga Paper Co. (D. C.) 234 Fed. 792, 37 Am. Bankr. Rep. 751; In re Miller, 19 N. B.

the discretion of the court.[109] And in a case where a mortgage creditor obtained permission of the bankruptcy court to foreclose his mortgage in a state court, but upon condition of waiving any personal claim for deficiency, but the creditor, for good reasons and without laches, failed to prosecute his suit to judgment, it was held that he was not bound, as by an election, to rely solely on the mortgaged property, but he might be subsequently admitted as a creditor against the estate on account of the same debt.[110]

It is also held by some of the decisions that the mortgagee of property of a bankrupt is equitably entitled to have the rents and profits of the property, collected by the trustee in bankruptcy, applied on the interest on his debt, if the security itself is insufficient,[111] particularly if he has secured an equitable lien on the rents by bill in equity and the appointment of a receiver after default.[112] But this is not undisputed, and certain other cases maintain that the mortgagee in such a case is not entitled to the rents unless, in addition to showing the insufficiency of his security, he actually intercepts and receives them.[113]

As to interest on the mortgage or other secured debt, it will ordinarily stop with the filing of the petition in bankruptcy, as debts accruing after that time are not provable in bankruptcy. Hence a secured creditor who sells the security after the filing of the petition, and finds the proceeds insufficient to pay the whole amount of his claim, is not entitled to apply such proceeds first to interest accrued since the filing of the petition, and then to the principal debt, and then prove a claim for the balance.[114] But in the exceptional case where an estate in bankruptcy is amply sufficient for the purpose, a mortgagee may be allowed full interest on his debt.[115] As to costs and fees, where these are stipulated in the mortgage to be paid in case of foreclosure by proceedings in court, they may be allowed when the security is realized on in the manner specified, but not where the property covered is sold by the trustee in bankruptcy at private sale under order of the court.[116]

R. 78, Fed. Cas. No. 9,555; In re Herrick, 17 N. B. R. 335, Fed. Cas. No. 6,421.

[109] In re Moller, 14 Blatchf. 207, Fed. Cas. No. 9,700.

[110] In re Linforth, 87 Fed. 386.

[111] In re Industrial Cold Storage & Ice Co., 163 Fed. 390, 20 Am. Bankr. Rep. 904. And see In re Bennett, 2 Hughes, 156, 12 N. B. R. 257, Fed. Cas. No. 1,313; Bindseil v. Liberty Trust Co., 248 Fed. 112, 160 C. C. A. 252, 41 Am. Bankr. Rep. 454.

[112] In re Snedaker (Utah) 4 N. B. R. 168.

[113] Foster v. Rhodes, 10 N. B. R. 523, Fed. Cas. No. 4,981; In re Hollenfeltz, 94 Fed. 629, 2 Am. Bankr. Rep. 499.

[114] Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, 25 Am. Bankr. Rep. 363, reversing In re Kessler, 180 Fed. 979, 103 C. C. A. 582, 24 Am. Bankr. Rep. 287, which affirmed In re Kessler & Co., 171 Fed. 751, 22 Am. Bankr. Rep. 606.

[115] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1.

[116] In re Roche (C. C. A.) 101 Fed. 956, 4 Am. Bankr. Rep. 369. And see

§ 566. Right to Rely on Security and Disregard Bankruptcy.—According to the great preponderance of authority, a secured creditor may, if he so chooses, rely entirely upon his security, refrain from proving his debt or making himself in any way a party to the proceedings in bankruptcy, and in effect disregard those proceedings altogether. It is true that he may be brought in by rule or petition, at the instance of the trustee in bankruptcy or the court, and submit his security and have its value determined, if there is reason to believe that the property affected may be of greater value than the amount of his claim. But so far as it depends on the creditor's own initiative, he is not bound to file a proof of debt or take any notice of the proceedings.[117] If he has no occasion to apply to the bankruptcy court for aid in the enforcement of his lien, he may rely upon his security and omit to prove his claim, and by so doing he will lose nothing but his right to participate in the distribution of the general estate of the bankrupt.[118] "A secured creditor can resort to one of three remedies. 1. He may rely upon his security. 2. He may abandon it and prove the whole debt as unsecured, or, 3, he may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. If he takes either of the two courses last named, he must of course prove his debt. But suppose he chooses to rely upon his security, there is no positive provision nor is there anything in the policy of the bankruptcy law requiring proof of the debt, unless he seeks the aid of the bankruptcy court to enforce his lien." [119] And if the creditor is in physical possession of personal property or collaterals pledged to him by the bankrupt, or chattels covered by a chattel mortgage, he cannot be compelled to surender the possession to the trustee in bankruptcy without satisfaction of his debt.[120]

There are, however, some decisions to the contrary of these propositions. It has occasionally been held that creditors secured by mort-

Gugel v. New Orleans Nat. Bank, 239 Fed. 676, 152 C. C. A. 510, 39 Am. Bankr. Rep. 160.

[117] Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589; Ward v. First Nat. Bank (C. C. A.) 202 Fed. 609, 29 Am. Bankr. Rep. 312; In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306; Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400; In re Haake, 2 Sawy. 231, 7 N. B. R. 61, Fed. Cas. No. 5,883; Jones v. Lellyet, 39 Ga. 64; Spilman v. Johnson, 27 Gratt. (Va.) 33, 16 N. B. R. 145; Selfridge v. Gill, 4 Mass. 95. As to the effect of bankruptcy on existing liens in general, see supra, §§ 363–391.

[118] Cottrell v. Pierson, 2 McCrary, 390, 12 Fed. 805.

[119] Wicks v. Perkins, 1 Woods, 383, 13 N. B. R. 280, Fed. Cas. No. 17,615.

[120] Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589; Cadmus v. Beman, Fed. Cas. No. 2,281; In re Buntrock Clothing Co., 92 Fed. 886, 1 Am. Bankr. Rep. 454; Dallas v. Flues, 8 Phila. 150, Fed. Cas. No. 3,544.

gage, judgment, or otherwise, must prove their debts, or else they will be barred of the right to collect the same and lose the benefit of their securities.[121] And a few decisions have insisted on the right of the trustee in bankruptcy to require and demand the surrender of personal property or collaterals held by a creditor as security.[122] While these views cannot be admitted as correct, yet much must depend upon the activity and discretion of the trustee in bankruptcy. It was well said by a learned referee in bankruptcy that it is the duty of the trustee to investigate property held by creditors as security or on which they claim liens, to determine its value and find out how and by what right it is held by them, and to determine whether there is any interest in the property which may be obtained for the general creditors. And although a creditor who holds collateral security which is of less value than the amount of his debt, may not offer to prove his claim in the bankruptcy proceedings, and may disclaim all intention of taking any part therein, yet he may be ordered to appear and produce the evidences of his debt and give an account of the amount, kind, and value of the securities held by him.[123] Yet it must be remembered that "an assignee in bankruptcy represents the general or unsecured creditors, and his duties relate chiefly to their interests. He is in no respect the agent or representative of secured creditors who do not prove their claims. He need not take measures for the sale of incumbered property unless the value of the property is greater than the incumbrance. He has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security. He cannot enforce contracts between creditors, except so far as they may directly or indirectly affect the fund he is to get into his hands for distribution under the law." [124]

But the court of bankruptcy always has jurisdiction, if the interests of the creditors at large are involved, to determine questions of liens on the property of the bankrupt or their validity or amount, and this jurisdiction may be invoked by the secured creditor himself, though

[121] Davis v. Anderson, 6 N. B. R. 145, Fed. Cas. No. 3,623; In re Davis, 2 N. B. R. 391, Fed. Cas. No. 3,618.

[122] In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; In re Huddleston, 1 Nat. Bankr. News, 214. See, as an extreme exponent of this view, the case of Phelps v. Sellick, 8 N. B. R. 390, Fed. Cas. No. 11,079.

[123] In re Coffin, 1 Nat. Bankr. News, 507.

[124] Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668.

he has not proved his debt.[125] And it cannot be said that the secured creditor has such an absolute right to disregard the proceedings in bankruptcy that he can proceed to enforce the security by the aid of the state courts without being interfered with by the trustee or the court of bankruptcy. If he brings a suit in a state court, after the commencement of the bankruptcy proceedings, to foreclose a mortgage or enforce any other lien, not having proved his debt or otherwise participated in the proceedings in bankruptcy, he may be enjoined from proceeding further with his suit, and such injunction may issue in a case where the trustee alleges that the mortgage or other security was fraudulent and void.[126] But still, if he takes this course under circumstances which appeared to justify it at the time, and it does not appear that other creditors were injured, it is the authority and discretion of the bankruptcy court to ratify and confirm a sale so made, as if leave to make it had first been obtained.[127]

Since the statute vests the trustee in bankruptcy with title to the bankrupt's property "as of the date when he was adjudged a bankrupt," it is held that, until that date, a lienor or pledgee is at liberty to make any disposition of or perfect any title to the property which the nature of the lien permits, and where he has converted the security into money pursuant to his contract rights, he may prove the unsatisfied balance of his claim.[128] It remains to be stated that, if the creditor relies on his security and omits to prove his claim in the bankruptcy, a discharge granted to the bankrupt will not be a bar or defense to any proceedings to enforce the lien, but will preclude the creditor from setting up any claim for a deficiency.[129]

§ 567. Foreclosure by Secured Creditor Independently of Bankruptcy.—A mortgagee or other lien creditor may prosecute a suit in a state court for the establishment and enforcement of his lien without regard to the pendency of proceedings in bankruptcy against the debtor, provided that he has not made himself a party to those proceedings and subjected himself to the jurisdiction of the court of bankruptcy by prov-

[125] In re High, 3 N. B. R. 191, Fed. Cas. No. 6,473.

[126] Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098; In re Snedaker (Utah) 3 N. B. R. 629; In re Brooks, 91 Fed. 508, 1 Am. Bankr. Rep. 531; In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830. See Barstow v. Peckham, 5 N. B. R. 72, Fed. Cas. No. 1,064.

[127] Bradley v. Adams Exp. Co., 3 Fed. 895.

[128] In re Mertens, 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362.

[129] Dixon v. Barnum, 3 Hughes, 207, Fed. Cas. No. 3,928; Pease v. Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566; Cohn v. Colby, 57 How. Prac. (N. Y.) 168; Barnett v. Salyers (Ky.) 12 S. W. 303; Kinloch v. Savage, Speer, Eq. (S. C.) 464.

ing his claim or otherwise, and provided that no action is taken by the trustee in bankruptcy to interfere with such suit, nor any order to that effect issued by the bankruptcy court.[130] And particularly if foreclosure proceedings have proceeded in a state court so far as the rendition of a judgment or decree before any adjudication in bankruptcy is made, the whole matter is then within the exclusive jurisdiction of the state court, and the execution of the decree will not be stayed or enjoined.[131] There is, however, an interval during which it would be unsafe for the creditor to proceed in this manner, and during which other creditors would have good ground for applying to the bankruptcy court to stay his hand. This is the time which elapses between the adjudication in bankruptcy and the appointment of a trustee. Since that officer, when appointed, will be under the duty of investigating the security and the property which it is alleged to cover, and of determining whether there is any equity which can be made available for the general creditors, a sale made before he is qualified will be at least voidable as against him.[132] And some of the cases hold that the trustee will not be barred or in any way affected by a decree of foreclosure if he was not joined as a party in the suit in which it was rendered, since he succeeds in title to the equity of redemption of the bankrupt.[133] And since all property of the bankrupt is at least constructively in the possession of the trustee, a chattel mortgagee cannot take possession of the property covered, after the appointment of the trustee, unless it be with the consent of the latter. Possession so taken is not lawful and cannot be retained against the demand of the trustee for the surrender of the

[130] Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; In re Roseberry, 8 Biss. 112, 16 N. B. R. 340, Fed. Cas. No. 12,052; Sedgwick v. Grinnell, 9 Ben. 429, Fed. Cas. No. 12,612; In re Davis, 1 Sawy. 260, 4 N. B. R. 715, Fed. Cas. No. 3,620; In re Smith, 2 Ben. 432, 1 N. B. R. 599, Fed. Cas. No. 12,973; Swope v. Arnold, 5 N. B. R. 148, Fed. Cas. No. 13,702; Yeadon v. Planters' & Mechanics' Bank, Fed. Cas. No. 18,130; Brown v. Gibbons, 37 Iowa, 654, 13 N. B. R. 407; Hayes v. Dickinson, 9 Hun (N. Y.) 277, 15 N. B. R. 350; Barber v. Terrell, 54 Ga. 146; Cumming v. Clegg, 52 Ga. 605, 14 N. B. R. 49; Winship v. Phillips, 52 Ga. 593, 14 N. B. R. 50; Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476, 14 N. B. R. 329; Hatcher v. Jones, 53 Ga. 208, 14 N. B. R. 387; Biddle's Appeal, 68 Pa. St. 13, 9 N. B. R. 144; Green v. Arbuthnot, 4 Wkly. Notes Cas. (Pa.) 357. Further as to foreclosure and sale by secured creditor, see, supra, §§ 387, 390. Contra, see In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; Ex parte Taylor, 1 Hughes, 617, 16 N. B. R. 40, Fed. Cas. No. 13,773; Blum v. Ellis, 73 N. C. 293, 13 N. B. R. 345; In re Gerdes, 2 Nat. Bankr. News, 131; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159.

[131] In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; In re Holloway, 93 Fed. 638, 1 Am. Bankr. Rep. 659. See Callagan v. American Trust & Savings Bank, 196 Ill. App. 102.

[132] In re Brooks, 91 Fed. 508, 1 Am. Bankr. Rep. 531; Taylor v. Robertson, 21 Fed. 209.

[133] Barron v. Newberry, 1 Biss. 149, Fed. Cas. No. 1,056; Townshend v. Thomson, 60 N. Y. Super. Ct. 454, 18 N. Y. Supp. 870; Griffin v. Hodshire, 119 Ind. 235, 21 N. E. 741.

property.[134] But the adjudication is no bar to an ejectment by a mortgagee against a third person, not connected with the trustee in bankruptcy, even though such suit is brought without permission of the court of bankruptcy, where the trustee never assumed possession of nor intermeddled with the estate affected.[135] And in general, if the trustee is satisfied that the secured creditor's claim is valid and that the property covered is of no greater value than will be sufficient to pay it, he may abandon the property to the creditor;[136] and when this is done it is perfectly permissible for the creditor to proceed as if no proceeding in bankruptcy were pending, and for a state court to take and exercise jurisdiction without regard to such proceeding;[137] and such abandonment may be presumed when the trustee takes no steps to bring the property within the jurisdiction of the court of bankruptcy for administration,[138] or when he permits a pending foreclosure suit to proceed without objection or intervention.[139] As for the court of bankruptcy, it will, in general, interfere with the creditor's proceedings only where the interests of the general creditors will be materially affected or where there is controversy as to the validity of the alleged lien.[140] In the absence of such circumstances, it may permit the creditor to proceed in his own way and allow him to make a sale of the property.[141] But still, even in such a case, if any fraud is discoverable in the sale, the bankruptcy court will not hesitate to interfere, as was done in a case where a pledgee of valuable collateral sold it to himself at a pretended auction sale for about one-sixth its nominal value, after the filing of a petition in bankruptcy against the pledgor, and without any other authority than the contract of pledge, and without notice to the pledgor or any other party in interest.[142] And where the mortgagee of property has proved his debt in the bankruptcy proceedings, and the court of

[134] In re Gutman, 114 Fed. 1009, 8 Am. Bankr. Rep. 252; In re Rosenberg, 3 Ben. 366, 3 N. B. R. 130, Fed. Cas. No. 12,055; Hutchings v. Muzzy Iron Works, 8 N. B. R. 458, Fed. Cas. No. 6,952.

[135] Eyster v. Gaff, 2 Colo. 228.

[136] Second Nat. Bank v. National State Bank, 10 Bush (Ky.) 367; In re Moller, 8 Ben. 526, Fed. Cas. No. 9,699.

[137] Stoddard v. Locke, 43 Vt. 574, 5 Am. Rep. 308, 9 N. B. R. 71; Second Nat. Bank v. National State Bank, 10 Bush (Ky.) 367.

[138] Crowe v. Reid, 57 Ala. 281.

[139] In re Stansfield, 4 Sawy. 334, 16 N. B. R. 268, Fed. Cas. No. 13,294.

[140] Goddard v. Weaver, 1 Woods, 257, 6 N. B. R. 440, Fed. Cas. No. 5,495. And see Bean v. Parker, 89 Vt. 532, 96 Atl. 17. Whether the administration of a mortgaged stock of merchandise should be left to the state court, which had taken jurisdiction, or be brought into the bankruptcy proceedings, is for the determination of the judge of the bankruptcy court. Bank of Dillon v. Murchison, 213 Fed. 147, 129 C. C. A. 499, 31 Am. Bankr. Rep. 740.

[141] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830; In re Sacchi, 10 Blatchf. 29, 6 N. B. R. 497, Fed. Cas. No. 12,200.

[142] In re Mertens, 134 Fed. 101, 14 Am. Bankr. Rep. 226.

bankruptcy has made an order for the sale of the property, in a proceeding to which he was a party, he cannot then go into a state court and sue for foreclosure.[143]

Where the security takes the form of a deed of trust in the nature of a mortgage, the rights of the secured creditor (beneficiary) are not materially different from those of the mortgagee in a common-law mortgage. There is some authority for the doctrine that a power of sale given in a mortgage is not a power coupled with an interest, and therefore is revoked by the bankruptcy of the mortgagor, as it would be by his death.[144] But this cannot be the case with a deed of trust by which the legal title is vested in one or more trustees for the benefit of the lawful holder of the obligation secured, since in this case nothing comes within the scope of the bankruptcy proceedings but the grantor's reversionary or equitable title.[145]

Where, prior to the commencement of the proceedings in bankruptcy, a receiver is appointed in an action in a state court to foreclose a mortgage, property in his possession cannot be taken by the trustee in bankruptcy without discharging the mortgage debt.[146] But after the appointment of the trustee, a receiver will not be appointed for the bankrupt's mortgaged land, as the trustee is clothed with like functions as a receiver.[147]

§ 568. Same; Obtaining Permission of Bankruptcy Court.—Under the bankruptcy act of 1867, there were numerous decisions to the effect that, after the commencement of the proceedings in bankruptcy, a creditor secured by a mortgage or deed of trust, or a pledge or a mechanic's lien, or holding an execution, could not proceed to enforce his security by sale of the property without the permission of the bankruptcy court first obtained, and that a sale made without such leave was voidable and would be set aside on a proper application.[148] And at least one decision under the present statute has been rendered to the same effect.[149] Fur-

[143] Levy v. Haake, 53 Cal. 267.

[144] Lockett v. Hoge, 9 N. B. R. 167, Fed. Cas. No. 8,444. And see Morris v. Davidson, 49 Ga. 361, 11 N. B. R. 454.

[145] McGready v. Harris, 54 Mo. 137, 9 N. B. R. 135. See In re Davis, 2 N. B. R. 391, Fed. Cas. No. 3,618.

[146] Davis v. Railroad Co., 1 Woods, 661, 13 N. B. R. 258, Fed. Cas. No. 3,648.

[147] In re Bennett, 2 Hughes, 156, 12 N. B. R. 257, Fed. Cas. No. 1,313.

[148] Smith v. Kehr, 2 Dill, 50, 7 N. B. R. 97, Fed. Cas. No. 13,071; In re Cook, 3 Biss. 116, Fed. Cas. No. 3,151; In re McGilton, 3 Biss. 144, 7 N. B. R. 294, Fed. Cas. No. 8,798; Lee v. Franklin Avenue German Sav. Inst., 3 N. B. R. 218, Fed. Cas. No. 8,188; Phelps v. Sellick, 8 N. B. R. 390, Fed. Cas. No. 11,079; Dooley v. Virginia Fire & Marine Ins. Co., 2 Hughes, 482, Fed. Cas. No. 3,998; The Skylark, 4 Biss. 388, Fed. Cas. No. 12,929; Stemmons v. Burford, 39 Tex. 352; In re Needham, Fed. Cas. No. 10,081a; Société d'Epargnes v. McHenry, 49 Cal. 351. Contra, In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830; In re Moller, 14 Blatchf. 207, Fed. Cas. No. 9,700.

[149] In re Emslie (C. C. A.) 102 Fed. 291, 4 Am. Bankr. Rep. 126.

ther, it was held that, in order to entitle a mortgagee to apply for leave to foreclose in another court, he must first prove his debt, and his petition for leave must fully describe his debt, its nature and amount, and the property affected, the other incumbrances, if any, and the actual value of the property; and if the value of the property was greater than the incumbrances, the petition must make it appear that the rights of the creditor could not be fully protected by a sale made by the trustee in bankruptcy,[150] and the creditor must notify the trustee of his application, failing which it should be dismissed.[151] But the Supreme Court refused to accept or sanction this doctrine, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding in bankruptcy had been commenced, and without first applying to the bankruptcy court for leave,[152] and the best modern decisions accord with this last view.[153]

§ 569. Same; Authority of Bankruptcy Court to Stay or Enjoin Proceedings.—The court of bankruptcy has jurisdiction to "assume the entire administration of the estate of the debtor, to determine all questions touching the existence of liens thereon, and to ascertain and settle the amount of such liens, and make provision for the liquidation and settlement thereof; and as incidental to this, it has ample power to restrain a claimant of such lien from proceeding elsewhere to enforce his lien." [154] And it is generally proper so to enjoin the secured creditor when the value of the property exceeds the amount secured by the mortgage or other lien, or where the validity or amount of the lien is disputed, or there is danger that the property may be sacrificed, or where the course taken by the secured creditor would be prejudicial to the interests of the general body of creditors.[155] And where there is no

[150] In re Sabin, 9 N. B. R. 383, Fed. Cas. No. 12,193.

[151] In re Frizelle, 5 N. B. R. 122, Fed. Cas. No. 5,133.

[152] Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

[153] In re Mertens, 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362.

[154] In re Clark, 9 Blatchf. 372, 6 N. B. R. 403, Fed. Cas. No. 2,801.

[155] In re San Gabriel Sanatorium Co. (C. C. A.) 102 Fed. 310, 4 Am. Bankr. Rep. 197; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Snedaker (Utah) 3 N. B. R. 629; In re Iron Mountain Co., 9 Blatchf. 320, 4 N. B. R. 645, Fed. Cas. No. 7,065; The Skylark, 4 Biss. 388, Fed. Cas. No. 12,929; McLean v. Lafayette Bank, 3 McLean, 185, Fed. Cas. No. 8,885; Platt v. Dickenson, Fed. Cas. No. 11,216a; In re Kerosene Oil Co., 3 Ben. 35, 2 N. B. R. 528, Fed. Cas. No. 7,725; In re Hanna, 4 Ben. 469, 4 N. B. R. 411, Fed. Cas. No. 6,026; Getz v. First Nat. Bank, Fed. Cas. No. 5,374; In re New York Kerosene Oil Co., 3 N. B. R. 125, Fed. Cas. No. 10,206; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965; In re Brinkman, 7 N. B. R. 421, Fed. Cas. No. 1,884; Whitman v. Butler, 8 N. B. R. 487, Fed. Cas. No. 17,579; Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098; McKay v. Funk, 37 Iowa, 661, 13 N. B. R. 334; Markson v. Haney, 47 Ind. 31, 12 N. B. R. 484.

dispute as to the title to the property but only a question as to the enforcement of a lien upon it, a formal or plenary proceeding is not necessary, but the petition to enjoin the creditor from foreclosing may be heard and determined in a summary manner.[156] But courts of bankruptcy will be chary of interfering with a creditor who is proceeding to enforce an admittedly valid lien in the manner ordinarily appropriate for that purpose. The drastic step of enjoining him will be taken only when it is necessary to protect an equity of the bankrupt or to prevent a sacrifice of, or serious injury to, the interests of the creditors at large.[157] Hence, if it is clearly shown that the property affected is of no value beyond the admitted incumbrances upon it, so that there is nothing to be gained for the general creditors, an injunction will be refused, or, if issued, will be dissolved.[158] And a trustee in bankruptcy cannot have an injunction against a foreclosure in a state court of a mortgage against the bankrupt, where he appeared and permitted the proceedings to advance to a final adjudication, and no injury is done thereby to the estate of the bankrupt.[159]

§ 570. Redemption of Property by Trustee.—A trustee in bankruptcy is vested with such an interest in the mortgaged real estate of the bankrupt as entitles him to pay off the mortgage debt and have the mortgage assigned to himself or to a person designated by him, although it is not in process of foreclosure, where it is shown that such a course will be for the benefit of the estate, by enabling him to sell the property to better advantage; and the court of bankruptcy has jurisdiction, on his petition, to compel the mortgagee to accept payment and execute the assignment.[160] The procedure for this purpose has been prescribed as follows: "Whenever it may be deemed for the benefit of an estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property real or personal, ... the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor, and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why

[156] In re Clark, 9 Blatchf. 372, 6 N. B. R. 403, Fed. Cas. No. 2,801.

[157] In re Davis, 8 N. B. R. 167, Fed. Cas. No. 3,619; Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; Pennington v. Sale, 1 N. B. R. 572, Fed. Cas. No. 10,939; In re Wilbur, 1 Ben. 527, 3 N. B. R. 276, Fed. Cas. No. 17,633.

[158] In re O'Malley, Fed. Cas. No. 10,507a; In re Iron Mountain Co., 9 Blatchf. 320, 4 N. B. R. 645, Fed. Cas. No. 7,065; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891.

[159] Augustine v. McFarland, 13 N. B. R. 7, Fed. Cas. No. 648.

[160] In re Bacon, 132 Fed. 157, 12 Am. Bankr. Rep. 730; In re Straub, 158 Fed.

an order should not be passed by the court upon the petition authorizing such act on the part of the trustee." [161] Where payment of an alleged specific lien is made by a bankrupt's trustee after notice to all creditors and without objection, a general judgment creditor claiming a prior lien cannot thereafter object, the rule being that lien creditors who are not prompt and persistent in asserting their rights may lose them.[162]

§ 571. Sale of Property by order of Bankruptcy Court.—The court of bankruptcy has jurisdiction and power to dispose of incumbered property of the bankrupt in any manner deemed best for the interests of all concerned. It may order such property to be sold by the trustee in bankruptcy, and may direct the sale to be made subject to a particular lien, admitted to be valid, or free of all liens and incumbrances, and in the latter case the proceeds of the sale will be brought into court for distribution to those entitled, and any valid lien will be transferred from the property to the fund in court.[163] And this action may be taken not only at the instance of the trustee in bankruptcy, but the lien creditor himself may petition the court to take charge of the property and order its sale, or for leave to conduct the sale himself, in either case first proving his debt and making at least a prima facie showing as to the validity and priority of his lien.[164] An order of the bankruptcy court so made will oust the jurisdiction of the state courts to foreclose the lien in the ordinary way.[165] But it can only be justified by the existence of an equity in the property which can be made available for the general creditors. And hence, if it is quite clear that the property is not worth anything more than the amount of the mortgage or other incumbrance upon it, the court will not order its sale, but will leave the creditor to deal with it in his own way.[166] If, however, a sale has been ordered and made and the proceeds brought into court, all questions concerning the right of the creditor to payment out of the fund, or the amount to which he is entitled, must be determined by the bankruptcy

375, 19 Am. Bankr. Rep. 808; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965. And see supra, § 305.

[161] General Order in Bankruptcy, No. 28.

[162] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[163] In re Booth, 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Schnepf, 2 Ben. 72, 1 N. B. R. 190, Fed. Cas. No. 12,471; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728; In re Hambright, 2 N. B. R. 498, Fed. Cas. No. 5,973; Davis v. Anderson, 6 N. B. R. 145, Fed. Cas. No. 3,623; In re Salmons, 2 N. B. R. 56, Fed. Cas. No. 12,268; Second Nat. Bank v. National State Bank, 10 Bush (Ky.) 367, 11 N. B. R. 49. And see supra, §§ 470, 471.

[164] In re Stewart, 1 N. B. R. 278, Fed. Cas. No. 13,418; In re Bigelow, 2 Ben. 480, 1 N. B. R. 632, Fed. Cas. No. 1,396.

[165] In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3,847.

[166] In re Lambert, 2 N. B. R. 426, Fed. Cas. No. 8,026; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965.

court on a petition for distribution, not by a suit at law.[167] And if the property does not bring as much as the amount of the lien, the creditor is not entitled to be paid in full out of the estate as holding a privileged debt; in other words, he cannot come upon the general funds of the estate for the deficiency in the character of a lien creditor, though he may prove a claim for such deficiency as a general or unsecured creditor.[168] And even ahead of the claim of the lien creditor, the proper costs and expenses of the sale must be paid out of the proceeds.[169]

§ 572. Marshalling Assets.—As among the various secured creditors of a bankrupt, the general equitable principle of marshalling securities will be applied, so that a creditor having security on two or more funds or properties will be required to exhaust that on which his lien stands alone, before proceeding against that on which other creditors beside himself have liens.[170] Thus, where a creditor held several judgment notes against a debtor and also some mortgages and two insurance policies as collateral, and caused judgment to be entered on the notes and execution issued thereon, and shortly afterwards a petition was filed against the debtor and he was adjudged bankrupt, it was held that the court had power so to marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund.[171] But where the purchaser of a tract of land gave a mortgage back covering the entire property and afterwards divided it into lots, and sold some of them, and others remained on his hands at the time of his adjudication in bankruptcy, and these were sold by the trustee in bankruptcy discharged of incumbrances, thus displacing the lien of a second mortgage which covered these lots only, it was held that the fund belonged to the first mortgagee and not to the second. The second mortgagee attempted to invoke the equitable principle that where several pieces of real estate, subject to a common incumbrance, are successively aliened, they are liable for the incumbrance in the inverse order of alienation. But the court said that there was here but one fund for distribution, and on that the senior mortgage was unquestionably the prior lien, and that the junior mortgagee must seek subrogation and indemnity in another proceeding.[172]

[167] In re Masterson, 4 N. B. R. 553, Fed. Cas. No. 9,268.

[168] In re Purcell, 2 Ben. 485, 2 N. B. R. 22, Fed. Cas. No. 11,469.

[169] In re Baughman, 163 Fed. 669, 20 Am. Bankr. Rep. 81; In re Ellerhorst, 2 Sawy. 219, 7 N. B. R. 49, Fed. Cas. No. 4,380; In re Dumont, 4 N. B. R. 17, Fed. Cas. No. 4,127.

[170] In re Sauthoff, 7 Biss. 167, 14 N B. R. 364, Fed. Cas. No. 12,379; In re Bowler, 2 Hughes, 319, Fed. Cas. No. 1,735; McLean v. Lafayette Bank, 4 McLean, 430, Fed. Cas. No. 8,889. And see In re Thompson (D. C.) 208 Fed. 207, 31 Am. Bankr. Rep. 236.

[171] In re Sauthoff, 7 Biss. 167, 14 N. B. R. 364, Fed. Cas. No. 12,379.

[172] In re Carothers, 12 Fed. 692.

CHAPTER XXIX

PREFERENCES AND PREFERRED CREDITORS

§ 573. Preferences at Common Law.—At common law, and except as expressly forbidden by statute, an insolvent debtor has the right to prefer one creditor over others by a payment, transfer, or pledge of

property which will satisfy that creditor in full or to a greater extent than other creditors; and although such a preference may be inherently unjust, and may prevent other creditors from collecting their debts, yet it is not fraudulent or voidable if made in satisfaction of a real debt, and in good faith, with no secret arrangement for the debtor's own benefit.[1] It follows, therefore, that a preference is not voidable when made before the enactment of the bankruptcy law,[2] nor in any case unless brought plainly within the express terms of that statute. Hence payments made to the government by a United States revenue collector, within four months prior to his being adjudged a bankrupt, though actually intended to give a preference, are not within the statute; for, aside from the fact that the United States is probably not included in the term "creditor," preferential payments to the government are not expressly forbidden by the act, and the government is not bound unless expressly named.[3]

§ 574. **Preferences Under Bankruptcy Act.**—Preferences are defined, and provision is made for their recovery or avoidance, in two subsections of the bankruptcy act of 1898, the first of which was amended in 1903, and the second, after having been also amended in 1903, was materially changed by a further amendment in 1910. The former now reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." The amendment of 1903 consisted substantially in adding to the original provision the above clause as to making the four months' period run from the recording or regis-

[1] In re Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145; Voorhees v. Blanton, 83 Fed. 234; Cary & Moen Co. v. McKey, 40 Fed. 858; Strauss v. Abrahams, 32 Fed. 310; Means v. Montgomery, 23 Fed. 421; Smith v. Craft, 11 Biss. 340, 12 Fed. 856; Bean v. Brookmire, 1 Dill. 25, 4 N. B. R. 196, Fed. Cas. No. 1,168; Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946; Hislop v. Hoover, 68 N. C. 141; Hafner v. Irwin, 1 Ired. (23 N. C.) 490. A preference under the Bankruptcy Act differs from a fraudulent transfer at common law, in that the former is only malum prohibitum, while the latter malum in se. Richardson v. Germania Bank (C. C. A.) 263 Fed. 320, 45 Am. Bankr. Rep. 351.

[2] In re Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145.

[3] Tiffany v. Morrison, 3 Colo. 43, 18 N. B. R. 365. But see Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437.

tering of the transfer. As to this, the amendatory act was held not to be retrospective.[4] The second subsection, as now in force, declares that "if a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person, or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." [5] Where a mortgage, or any other transfer, was executed by the bankrupt to a creditor subsequent to June 25, 1910, the question whether it was a voidable preference is governed by the section above quoted as amended on that date.[6]

The bankruptcy act does not prohibit or annul all transfers of property by an insolvent debtor, but only those which are made under the special conditions and circumstances which it sets forth.[7] And a conveyance or security given to a creditor, made and operating as a preference, may even be an act of bankruptcy and yet be valid to the extent that the property or security transferred cannot be wrenched from the creditor by the trustee in bankruptcy.[8] Further, as has previously been pointed out, there is a very material difference between a fraudulent transfer and a preferential transfer.[9] And if a given transfer of property was not fraudulent in fact, the question whether it is voidable as a

[4] Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486.

[5] Bankruptcy Act 1898, § 60, a, b, as amended by Act Cong. Feb. 3, 1903 (32 Stat. 797), and Act Cong. June 25, 1910, 36 Stat. 838. This, like other provisions of the Bankruptcy Act, is for carrying out its main purpose of securing to creditors the bankrupt's entire property. Corey v. Blackwell Lumber Co., 24 Idaho, 642, 135 Pac. 742. It is of the essence of a preference that it enables the creditor to obtain a greater percentage of his debt than other creditors "of the same class." This refers to the four classes of creditors specified in § 64, namely, tax creditors, creditors for wages, creditors entitled by law to priority, and general creditors; and secured general creditors are in the same class as unsecured creditors. In re Star Spring Bed Co. (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328.

[6] Ogden v. Reddish (D. C.) 200 Fed. 977, 29 Am. Bankr. Rep. 531.

[7] Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; In re Chicago Car Equipment Co., 211 Fed. 638, 128 C. C. A. 142, 31 Am. Bankr. Rep. 617,

[8] Ashby v. Steere, 2 Woodb. & M. 347, Fed. Cas. No. 576.

[9] Supra, § 453. And see Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412.

preference must be determined entirely in accordance with the express provisions of the statute.[10] And if a trustee in bankruptcy sues to set aside a transfer, alleging it to have been given as an illegal preference, he cannot recover on showing that the conveyance was void at common law or under the law of the state.[11]

§ 575. Essentials of a Voidable Preference.—The following elements of a voidable preference are enumerated by the statute: First, there must have been either an act of the debtor in procuring or suffering a judgment to be entered against him or making a "transfer" of any of his property, taking that term in the very wide sense in which it is defined by the bankruptcy act. Second, the debtor must have been insolvent either at the time of the transfer, or of its recording, or of the entry of the judgment. Third, these things must have concurred within four months before the filing of the petition in bankruptcy, or after the filing and before the adjudication. Fourth, the judgment or transfer must operate as a preference, that is, enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. Fifth, the person receiving it or to be benefited by it (or his agent acting in the transaction) must have had reasonable cause to believe that the enforcement of the judgment or transfer would effect a preference. These various elements will be separately discussed in the following sections of this chapter. But at present it is necessary to remark that all of them must be present or concur in order to give the trustee in bankruptcy the right to recover the payment or property or avoid the transfer as a preference.[12] Further, it is necessary that the transfer or giving of se-

[10] In re Armstrong, 145 Fed. 202, 16 Am. Bankr. Rep. 583; Sheppard-Strassheim Co. v. Black, 211 Fed. 643, 128 C. C. A. 147, 33 Am. Bankr. Rep. 574.

[11] Cragin v. Carmichael, 2 Dill. 519, 11 N. B. R. 511, Fed. Cas. No. 3,319.

[12] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; Smith v. Powers (D. C.) 255 Fed. 582, 43 Am. Bankr. Rep. 303; Hagar v. Watt (D. C.) 232 Fed. 373, 36 Am. Bankr. Rep. 370; Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325, 31 Am. Bankr. Rep. 225; In re Starkweather & Albert (D. C.) 206 Fed. 797, 30 Am. Bankr. Rep. 743; Sparks v. Marsh (D. C.) 177 Fed. 739, 24 Am. Bankr. Rep. 280; In re Gesas, 146 Fed. 734, 77 C. C. A. 291, 16 Am. Bankr. Rep. 872; Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Craig v. Sharp (Mo. App.) 219 S. W. 95; Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825; Ernest Wolff Mfg. Co. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396; Corey v. Blackwell Lumber Co., 24 Idaho, 642, 135 Pac. 742; Cauthorn v. Burley State Bank, 26 Idaho, 532, 144 Pac. 1108; Soule v. First Nat. Bank, 26 Idaho, 66, 140 Pac. 1098; Baden v. Bertenshaw, 68 Kan. 32, 74 Pac. 639; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; Whitwell v. Wright, 115 N. Y. Supp. 48; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; M. Kahn & Bro. v. Bledsoe, 22 Okl. 666, 98 Pac. 921; Stewart v. Hoffman, 31 Mont. 184, 77 Pac. 689, 81 Pac. 3; Locke v. Winning, 3 Mass. 325. The giving of a preference must be the act of the bank-

curity should be actual and in such form as to be effective if not avoided in the bankruptcy proceedings. A mere intent to give or to gain a preference is nothing at all if not accomplished by the execution of the purpose.[13] It is essential that the creditor should actually receive some portion of the bankrupt's property or assets. And though the bankrupt may have made a transfer of property, intending that the creditor should receive it and thereby be preferred, this is not enough if the creditor does not receive the property.[14] So, a creditor who has never accepted a deed of trust or mortgage which would give him a preference may disclaim all interest in it and prove his debt as unsecured.[15] And a preference cannot be created by an attempted conveyance which was originally and remains a mere and absolute nullity.[16]

Again, it must be noted that the preference must be created by the act or procurement of the debtor, not by the creditor's assertion of an existing legal right or remedy. Thus, the act of one who simply retakes the possession of property of his own which is in the possession of the bankrupt does not make him a preferred creditor.[17] And this applies to the reclamation of property originally placed in the bankrupt's hands under a contract of conditional sale reserving title in the seller until payment.[18] And so, an unpaid vendor of goods who exercises the right of stoppage in transitu does not thereby gain a preference, though it be with the consent of the debtor, for the latter cannot be considered as active in the creation of a preference merely because he assents to what he could not lawfully prevent.[19]

Next, it is essential to a preferential transfer that the bankrupt should have turned over to the creditor some portion of his own property, so that his available estate is thereby diminished.[20] And the property transferred must have been of such a nature that his creditors would have the right to subject it to the satisfaction of their claims.[21]

rupt himself. Where a receiver in bankruptcy deposits money in a checking account with a bank to which the bankrupt was indebted, and which afterwards closes its doors, this is not the giving of a preference. In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[13] In re Bousfield & Poole Mfg. Co., 16 N. B. R. 489, Fed. Cas. No. 1,703.

[14] Aiello v. Crampton, 201 Fed. 891, 120 C. C. A. 189, 29 Am. Bankr. Rep. 1; Engel v. Union Square Bank, 182 N. Y. 544, 75 N. E. 1129.

[15] In re Saunders, 2 Low. 444, Fed. Cas. No. 12,371.

[16] Rosenbluth v. De Forest & Hotchkiss Co., 85 Conn. 40, 81 Atl. 955.

[17] In re Wright-Dana Hardware Co., 205 Fed. 335, 30 Am. Bankr. Rep. 582.

[18] In re Farmers' Co-operative Co., 202 Fed. 1005, 30 Am. Bankr. Rep. 187; In re Anson Mercantile Co., 203 Fed. 870; In re Levin, 173 Fed. 119, 21 Am. Bankr. Rep. 665.

[19] In re Foot, 11 Blatchf. 530, 11 N. B. R. 153, Fed. Cas. No. 4,907.

[20] Mason v. National Herkimer County Bank, 172 Fed. 529, 22 Am. Bankr. Rep. 733; In re Grocers' Banking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150; In re Schwab (D. C.) 258 Fed. 772, 44 Am. Bankr. Rep. 185; O'Connell v. City of Worcester, 225 Mass. 159, 114 N. E. 201.

[21] In re Leech, 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599.

Hence the transfer of an exempt homestead does not come within the denunciation of the act though every other element of a preference be present, except in so far as its value may exceed the statutory limit of the exemption.[22] And an assignment (as security for a loan) of something which does not constitute legal "property" but is no more than a mere revocable license or privilege, as, a newspaper agency or route, does not constitute a preference.[23] And mere fictitious book entries, though made through collusion between the creditor and the bankrupt, for the purpose of deceiving others, but which do not succeed in such purpose and do not affect the rights of other creditors, do not constitute a preference.[24] And so of the mere giving of an indorsed note by the bankrupt, as the advantage secured by the creditor is not out of the bankrupt's estate.[25] But on the other hand, it is immaterial to whom the transfer is made, if it is meant to pay the claim of one creditor in preference to others;[26] and a transfer by a bankrupt indirectly or through a third person may constitute a preference, if made with this purpose and intent.[27] And the making of the preference and incurring its penalty are independent of any actual fraud,[28] and the result is the same whether or not the transfer is fraudulent at common law, or under the statute of fraudulent conveyances, or otherwise.[29] And the mere failure to record a deed or mortgage given as security until after the bankruptcy of the grantor does not constitute the same an unlawful preference.[30]

But there must have been a real antecedent debt or claim of the creditor to be satisfied. It is held that a contract between a bank making loans from day to day to a stockbroker and the broker, which stipulates that the day loans shall be used specifically for the release of the broker's pledged securities, that their proceeds or the proceeds of substituted securities shall be immediately deposited in the bank in repayment of the loan, and that the broker shall actually take up the pledged securities and deliver them to purchasers against payment of the price, does not create a voidable preference by the broker. For "the loan and repayment the same day should be regarded as one transaction, the fact

[22] First Nat. Bank v. Lanz, 202 Fed. 117, 29 Am. Bankr. Rep. 247; First Nat. Bank of Cleveland v. Orten, 43 Okl. 325, 142 Pac. 1096.

[23] In re Martin, 200 Fed. 940, 29 Am. Bankr. Rep. 623.

[24] In re Steam Vehicle Co., 121 Fed. 939, 10 Am. Bankr. Rep. 385.

[25] Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438.

[26] Bank of Wayne v. Gold, 146 App. Div. 296, 130 N. Y. Supp. 942.

[27] In re Harrison Bros., 202 Fed. 244; Wickwire v. Webster City Sav. Bank, 153 Iowa, 225, 133 N. W. 100; First Nat. Bank v. Blackburn, 256 Fed. 527, 167 C. C. A. 599, 43 Am. Bankr. Rep. 680.

[28] Wright v. Cotten, 140 N. C. 1, 52 S. E. 141.

[29] Webb's Trustee v. Lynchburg Shoe Co., 107 Va. 807, 60 S. E. 130; Williams v. German-American Trust Co., 219 Fed. 507, 135 C. C. A. 257, 33 Am. Bankr. Rep. 600.

[30] In re McIntosh, 150 Fed. 546, 80 C. C. A. 250, 18 Am. Bankr. Rep. 169; In re Sola e Hijo (C. C. A.) 261 Fed. 822, 44 Am. Bankr. Rep. 372.

that they were not literally contemporaneous being a necessary result of the nature of the business."[31] And it is essential that the effect of the preference should enable the creditor to obtain a larger proportion of his total claim than goes to other creditors of the same class.[32] Hence there is no preference if the creditor accepts only that part of his debt to which he would be entitled if all the property liable to the debtor's debts should be apportioned among his creditors.[33] But the test is this actual receiving of a larger percentage than other creditors; it is not whether or not, in view of the obligation of sureties to pay the claim, the payment actually benefited the preferred creditor.[34] And a payment is none the less a preference because some other creditors have also obtained larger payments on their claims than they would have been entitled to in the bankruptcy proceedings.[35] But if all the creditors consented to a discrimination in the payment of claims,[36] or if they all joined in the arrangement by which the transfer was made, no one can raise the objection that an unlawful preference was created, though one creditor did secure more than his share.[37] And if there is a surplus of the estate after paying all the other creditors, the preferred creditor is entitled to what he has secured, for, as between the bankrupt and himself, the preference is not voidable.[38]

§ 576. Transferee as "Creditor" or "Person Benefited."—A transfer or security, to amount to a preference, must have been given to a

[31] Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289. But the bank obtains a preference, voidable on the subsequent bankruptcy of the brokers, where after their suspension, it receives securities to make good the brokers' obligation to the bank, with notice in terms that it is thereby receiving a preference and that the brokers are going into bankruptcy. National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, 31 Am. Bankr. Rep. 291.

[32] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; John S. Brittain Dry Goods Co. v. Bertenshaw, 68 Kan. 734, 75 Pac. 1027; Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. Whether a payment effects a preference depends on its effect at the time when made, and not upon what other creditors receive on the final settlement. Slayton v. Drown, 93 Vt. 290, 107 Atl. 307. A preference by a bankrupt made within four months of his bankruptcy may be unlawful though only sufficient to pay a part of the indebtedness for which it is given. William Schuette & Co. v. Swank, 265 Pa. 576, 109 Atl. 531.

[33] Herzberg v. Riddle, 171 Ala. 368, 54 South. 635.

[34] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Star Spring Bed Co., 243 Fed. 957, 40 Am. Bankr. Rep. 1. A transfer of property, having all the essential elements of a preference, is voidable although the creditor received only an indirect benefit by the satisfaction of an obligation for which he was liable as a guarantor or otherwise. Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[35] In re Jacob Y. Shantz & Son Co. (D. C.) 205 Fed. 425, 30 Am. Bankr. Rep. 552; In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551.

[36] Curran v. Munger, 6 N. B. R. 33, Fed. Cas. No. 3,487.

[37] Judson v. Courier Co., 8 Fed. 422.

[38] In re McGuire, 8 Ben. 452, Fed. Cas. No. 8,813.

"creditor" or "person to be benefited thereby." Nothing is within the purview of this provision except with reference to debts which may be proved for a dividend, but, on the other hand, anything which may be proved is within its purview.[39] It is therefore not necessary that the creditor's claim should be presently due, it is sufficient if it exists as a fixed liability,[40] and a creditor who receives property in settlement of a claim not yet matured may be chargeable with accepting a preference.[41] Again, it is immaterial that the creditor may be an officer of the bankrupt corporation.[42] But a bankrupt who pays money to the creditors of his wife does not give a preference, although the effect is to reduce the percentage which would otherwise be paid to his own creditors.[43] So a person who has contracted to purchase property from the bankrupt and has made an advance payment thereon is not a "creditor" in any proper sense and the deduction of the amount of such advance from the price when payment was made on delivery is not the receiving of a preference.[44] The same is true of persons who may have a cause of action to

[39] Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413. And see Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, 35 Am. Bankr. Rep. 814; In re Webb Co. (D. C.) 224 Fed. 258, 34 Am. Bankr. Rep. 785; Bridgeton Nat. Bank v. Way, 253 Fed. 731, 165 C. C. A. 325. A bank which has discounted notes of third persons made payable to the bankrupt and indorsed by him is a general creditor of the bankrupt, as respects the question of receiving a preference. In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650. Though the bankrupt may have obtained money from another person by fraud, the latter has a claim against him provable in the bankruptcy proceedings and therefore is a creditor. Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632. But the provision as to preferences has no application to owners of property, who have no claim against a bankrupt contractor, on account of possible liens by a preferred subcontractor. Jump v. Bernier, 221 Mass. 241, 108 N. E. 1027. And where a corporation, at a time when it was solvent and a going concern, declared and paid dividends to its stockholders, which were received by them in ignorance of the fact that they were really paid out of the capital stock, the trustee, in the corporation's subsequent bankruptcy, cannot recover such dividends. Carlisle v. Ottley, 143 Ga. 797, 85 S. E. 1010, L. R. A. 1917C, 395, Ann. Cas. 1917A, 573.

[40] Moody v. Chicago Title & Trust Co., 138 Ill. App. 233; Burpee v. First Nat. Bank, 5 Biss. 405, 9 N. B. R. 314, Fed. Cas. No. 2,185; Bean v. Brookmire, 1 Dill. 25, 4 N. B. R. 196, Fed. Cas. No. 1,168. Extension of credit to a bankrupt for the price of stocks which were sold to it for cash will constitute the seller a general creditor, and render a mortgage given to secure the price a voidable preference. Security Trust & Sav. Bank v. Wm. R. Staats Co., 233 Fed. 514, 147 C. C. A. 400, 37 Am. Bankr. Rep. 547.

[41] Mathews v. Riggs, 80 Me. 107, 13 Atl. 48.

[42] Cooper v. Miller (C. C. A.) 203 Fed. 383, 30 Am. Bankr. Rep. 194. Where the owner of all the stock of a trading corporation, when it was indebted and within four months before the filing of a petition in bankruptcy against it, transferred the greater part of its bank deposit, which constituted practically its only asset, to himself in payment of alleged claims, the transaction constituted a preference. Boston West Africa Trading Co. v. Quaker City Morocco Co. (C. C. A.) 261 Fed. 665, 44 Am. Bankr. Rep. 315.

[43] In re Kayser, 177 Fed. 383, 100 C. C. A. 615, 24 Am. Bankr. Rep. 174.

[44] Templeton v. Kehler, 173 Fed. 575, 23 Am. Bankr. Rep. 41. But a husband's

charge the debtor with a statutory liability for the debts of a corporation.[45] And where one partner sells to the other his entire interest in the property of the firm, the transferee is not a creditor, and the transaction is not impeachable as a preference.[46] Again, where the bankrupt feloniously or fraudulently got possession of personal property which was in the custody of a warehouseman as bailee of the owner, and, on being discovered, settled with the warehouseman by turning over money, property, or securities, this does not constitute the giving of a preference, because the warehouseman was not a creditor of the bankrupt.[47] As to the meaning of the phrase "person to be benefited thereby," it is held that a transaction which has the purpose and effect of exonerating or releasing a surety for the bankrupt "benefits" the latter within the meaning of the statute.[48] And so, a transfer of property by an insolvent debtor by means of which a note given by himself and a surety is paid, and the transferee, who had obligated himself to indemnify the surety against loss thereon, is released from his liability, is one by which such transferee is benefited.[49]

To constitute a preference, it is further necessary that the preferred creditor should be placed in position to collect a greater percentage of his claim than "any other creditor of the same class." If all the creditors of the same class are equally interested in and benefited by the transaction in question, there is no preference.[50] And it is said that the test of the classification of creditors is the percentage of their claims which they are entitled to draw out of the estate of the bankrupt. If they are entitled to receive the same percentage, they are in the same class, but if different percentages, in different classes.[51] And the fact that a debt owing by an insolvent is secured does not prevent a transfer of property by the insolvent to pay it from being preferential as to creditors not secured.[52] At least, creditors whose claims are secured by indorsement or guaranty of one or more third persons are in the same class

breach of agreement to convey to his wife land purchased with her money, the title being taken in his own name, will make her a creditor, so that a conveyance in derogation of the rights of other creditors will operate as a preference. In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628.

[45] Cookingham v. Ferguson, 8 Blatchf. 488, 4 N. B. R. 635, Fed. Cas. No. 3,182.

[46] In re Rudnick, 102 Fed. 750, 4 Am. Bankr. Rep. 531.

[47] Keystone Warehouse Co. v. Bissell, 203 Fed. 652, 30 Am. Bankr. Rep. 213.

[48] In re Sanderson, 149 Fed. 273, 17 Am. Bankr. Rep. 871. And the rule is the same as to the accommodation indorser of the bankrupt's note. Goldman v. Cohen (C. C. A.) 261 Fed. 672, 44 Am. Bankr. Rep. 318.

[49] Huntington v. Baskerville, 192 Fed. 813, 113 C. C. A. 137, 27 Am. Bankr. Rep. 219.

[50] Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 N. Y. Supp. 90.

[51] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673.

[52] Horstman v. Little (Tex. Civ. App.) 88 S. W. 286.

as those whose claims are not so secured.[53] But strictly speaking, there are only two general classes of creditors, first, those who have priority and who are to be paid in full, and second, creditors who are entitled to equal dividends after the claims entitled to priority have been paid.[54] Hence, for instance, payments made by a bankrupt to a clerk within three months prior to the filing of the petition, in the absence of specific application to other debts, are to be applied in payment of the wages earned by the clerk during that time, but such payments, up to the amount of wages so earned, do not constitute a preference which must be surrendered before the clerk can prove his claim for the remainder due him, unless the bankrupt's assets are insufficient to pay all the priority claims.[55]

§ 577. Same; Guarantors, Sureties, and Indorsers.—A guarantor or surety for the bankrupt, or an indorser of his notes, or the accommodation maker of a note for his use and benefit, is a "creditor" within the meaning of the bankruptcy act, and if he receives money or security or collateral from the bankrupt to meet the obligation when it shall mature, or to secure himself against loss, under such circumstances as would constitute it a preference in other cases, he is to be treated as a preferred creditor, and must surrender his preference before being admitted to prove his debt, or may be required to surrender it at the suit of the trustee.[56] Thus, where an agreement for the indemnification of a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor's being unable to complete the undertaking, and the contractor subsequently abandoned the contract and was adjudged bankrupt, the surety became a creditor from the date of the abandon-

[53] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673. See In re Harpke, 116 Fed. 295, 54 C. C. A. 97, 8 Am. Bankr. Rep. 535.

[54] Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39.

[55] In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465.

[56] Cohen v. Goldman, 250 Fed. 599, 162 C. C. A. 615, 42 Am. Bankr. Rep. 85; Chapman v. Hunt (D. C.) 248 Fed. 160, 41 Am. Bankr. Rep. 482; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219; Lazarus v. Eagan, 206 Fed. 518, 30 Am. Bankr. Rep. 207; Paper v. Stern (C. C. A.) 198 Fed. 642, 28 Am. Bankr. Rep. 592; Kobusch v. Hand, 156 Fed. 660, 84 C. C. A. 372, 19 Am. Bankr. Rep. 379; Stern v. Paper, 183 Fed. 228, 25 Am. Bankr. Rep. 451; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; In re Christopher Bailey & Son, 166 Fed. 982, 21 Am. Bankr. Rep. 911; Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399, 8 Am. Bankr. Rep. 689; Crandall v. Coats, 133 Fed. 965, 13 Am. Bankr. Rep. 712; Thomas v. Woodbury, 1 Hask. 559, Fed. Cas. No. 13,916; Smith v. Little, 5 Biss. 490, 9 N. B. R. 111, Fed. Cas. No. 13,072; Scammon v. Cole, 3 Cliff. 472, 5 N. B. R. 257, Fed. Cas. No. 12,432; Ahl v. Thorner, 2 Bond, 287, 3 N. B. R. 118, Fed. Cas. No. 103; Sill v. Solberg, 10 Biss. 252, 6 Fed. 468; Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707; Bank of Wayne v. Gold, 146 App. Div. 296, 130 N. Y. Supp. 942; Platt v. Ives, 86 Conn. 690, 86 Atl. 579; M. Kahn & Bro. v. Bledsoe, 22 Okl. 666, 98 Pac. 921; Horstman v. Little (Tex. Civ. App.) 88 S. W. 286. Compare Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761.

ment of the contract, within the provisions of the statute relating to preferences, although the amount of the surety's claim depended on contingencies and was not liquidated.[57] So a surety for the bankrupt who has discharged the debt, either before or after the bankruptcy, is subrogated to the rights of the creditor, but is also affected by any preference received by the creditor before payment, which inheres in the claim.[58] But where an indorser receives from the maker of the note an amount sufficient to pay a part thereof, and loans him the balance required to pay it, he will not be chargeable with taking a preference beyond the amount actually paid to him by the maker.[59] On the same principle, a creditor who receives the debtor's note or check, indorses it, and procures it to be discounted at a bank, remains a creditor within the meaning of the bankruptcy act, and the payment of the note or check to the bank after the debtor's insolvency and within four months prior to his bankruptcy, constitutes a preferential transfer of property to the indorser, which will debar him from the allowance of any claim in his favor, unless the amount so paid is first surrendered.[60] Likewise, the payment to a bank by an insolvent, within four months prior to his bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank, which it must surrender before proving a claim against the estate.[61] But a note discounted by a bank without knowledge of the insolvency of the maker and in due course of business, by crediting the payee with the amount of the discount, which note in the hands of the payee and indorser would not be provable against the maker's estate in bankruptcy until certain preferences received were surrendered, is provable by the bank as a bona fide holder.[62]

§ 578. Nature and Form of Transaction.—Whether or not a given transaction amounts to a preference is to be determined by its effect in giving an undue advantage to the particular creditor, rather than by its form, for the court will look to the result and not to the way in which

[57] Wood v. United States Fidelity & Guaranty Co., 143 Fed. 424, 16 Am. Bankr. Rep. 21.

[58] Livingston v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39; In re Schmechel Cloak & Suit Co., 104 Fed. 64, 4 Am. Bankr. Rep. 719. But see In re New, 116 Fed. 116, 8 Am. Bankr. Rep. 566.

[59] Thomas v. Woodbury, 1 Hask. 559, Fed. Cas. No. 13,916.

[60] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Lyon, 121 Fed. 723, 58 C. C. A. 143, 10 Am. Bankr. Rep. 25; In re Meyer, 115 Fed. 997, 8 Am. Bankr. Rep. 598; In re Waterbury Furniture Co., 114 Fed. 255, 8 Am. Bankr. Rep. 79. But see In re Bullock, 116 Fed. 667, 8 Am. Bankr. Rep. 646; Thomas v. Woodbury, 1 Hask. 559, Fed. Cas. No. 13,916.

[61] In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221.

[62] In re Levi, 121 Fed. 198, 9 Am. Bankr. Rep. 176; In re Wyly, 116 Fed. 38, 8 Am. Bankr. Rep. 604.

it is accomplished.[63] In regard to "transfers" of property, this word is to be taken in the very broad sense assigned to it in the first section of the bankruptcy law, where it is declared that it shall include "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Hence, if the other conditions are present, any form of mortgage or other lien which is meant to give to one or more creditors an undue advantage over others, will be a voidable preference,[64] including a chattel mortgage,[65] or a deed of trust in the nature of a mortgage,[66] or an unrecorded bill of sale of furniture and fixtures given by a tenant as security for past-due rent,[67] or a bill of sale of property to a creditor who has attached it.[68] So, an assignment by an insolvent trader of his stock, book accounts, and other assets to one of his creditors, the latter in return agreeing to assume and pay certain debts, is a preference if it enables that creditor to secure his own debt in full or in a larger proportion than other creditors.[69] The same is true of the assignment of a policy of life insurance,[70] or of a claim against a fire insurance company for a loss under its policy.[71] And where a mortgage is given on property under circumstances such as to render it a voidable preference, and insurance is taken out on the mort-

[63] Rogers v. Fidelity Sav. Bank & Loan Co., 172 Fed. 735, 23 Am. Bankr. Rep. 1; In re C. J. McDonald & Sons, 178 Fed. 487, 24 Am. Bankr. Rep. 446. A transaction by which a bankrupt changed its indebtedness to a bank, so that it matured at an earlier date, and assigned collateral, the proceeds of which the bank at such earlier date applied on the indebtedness, was held to have effected a voidable preference. Fifth Nat. Bank v. Lyttle, 250 Fed. 361, 162 C. C. A. 431, 41 Am. Bankr. Rep. 370. A provision of law in Porto Rico gives a preferential status to debts when authenticated by acknowledgment before a notary. When this device is resorted to, with reference to a promissory note, by a creditor and an insolvent debtor within four months of his bankruptcy, to defeat the bankruptcy law, it must fail, as an attempt to create a preference. In re Vidal, 233 Fed. 733, 147 C. C. A. 499, 36 Am. Bankr. Rep. 783.

[64] In re Hawkins (D. C.) 243 Fed. 792, 40 Am. Bankr. Rep. 271; McLean v. Lafayette Bank, 3 McLean, 185, Fed. Cas. No. 8,885. A contract of conditional sale, by which the seller is allowed to retake possession of the goods in case of the buyer's default or bankruptcy, is not an unlawful preference, as the bankrupt buyer does not transfer any property or secure any antecedent debt. John Deere Plow Co. v. Edgar Farmer Store Co. (Wis.) 143 N. W. 194; Big Four Implement Co. v. Wright, 207 Fed. 535, 31 Am. Bankr. Rep. 125.

[65] Marsh v. Walters, 220 Fed. 805, 136 C. C. A. 409, 34 Am. Bankr. Rep. 85; In re Hersey (D. C.) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; Matthews v. Westphal (C. C.) 48 Fed. 664, 1 McCrary, 446.

[66] Dean v. Davis, 212 Fed. 88, 128 C. C. A. 658, 31 Am. Bankr. Rep. 808; May v. Le Claire (C. C.) 18 Fed. 164.

[67] In re Eckenroth, Fed. Cas. No. 4,265.

[68] Parsons v. Topliff, 119 Mass. 245, 14 N. B. R. 547.

[69] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; In re Gottlieb & Co. (D. C.) 245 Fed. 139, 40 Am. Bankr. Rep. 247; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678; Leonard v. Springer, 174 Ill. App. 516; North v. House, 6 N. B. R. 365, Fed. Cas. No. 10,310.

[70] Barnes v. Vetterlein, 16 Fed. 218.

[71] Hanson v. W. L. Blake & Co., 155 Fed. 342, 19 Am. Bankr. Rep. 325.

gaged property in the name of the mortgagor, but at the instance and expense of the mortgagee, and, a loss occurring, the insurance is collected by the mortgagee, being less in amount than the mortgage debt, the insurance contract is no less a preference than the mortgage, and its proceeds are merely a substitute for the mortgage pro tanto, and therefore recoverable by the mortgagor's trustee in bankruptcy.[72] Again, a lease of a manufacturing establishment, made by an insolvent debtor to one of his creditors as part of a fraudulent scheme to place his property within the exclusive control of such creditor, and accepted by the latter with knowledge of the lessor's insolvency, and with an intention of securing to himself an advantage over the other creditors, will be set aside as a preference.[73] A preference is also involved (the other conditions being present) in the sale of a partner's interest in the business to his co-partner and the taking of the latter's notes for the price,[74] and in the act of a creditor in appropriating property in his hands under a claim of a factor's lien,[75] or an alleged vendor's lien,[76] or an agreement between the debtor and creditor enabling the latter to enforce a lien by attachment.[77]

But on the other hand, where an unpaid vendor of merchandise accepts a return thereof, instead of payment, it may be regarded as a rescission of the contract of sale, rather than as a transfer of property.[78] And an insurance effected by an insolvent debtor upon the house he occupies in pursuance of covenants in the lease is not a preference,[79] nor is the surrender of a policy of insurance under a stipulation giving such right, with a return of a part of the premium paid.[80] The same is true of the equitable lien upon funds or property arising from the acceptance of a bill of exchange.[81] And a deed of property executed by the bankrupt in pursuance of a decree of a state court, on a showing that he had misappropriated trust funds which had been finally invested in such

[72] Brown City Sav. Bank v. Windsor, 198 Fed. 28; State Bank of Clearwater v. Ingram, 237 Fed. 76, 150 C. C. A. 278, 38 Am. Bankr. Rep. 447. Compare Sullivan v. Myer, 137 Tenn. 412, 193 S. W. 124.

[73] Carter v. Hobbs, 94 Fed. 108, 2 Am. Bankr. Rep. 224.

[74] Crampton v. Jerkowski, 2 Fed. 489; Mattocks v. Rogers, 1 Hask. 547, Fed. Cas. No. 9,300. And see Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696.

[75] Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286.

[76] In re Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254.

[77] Samson v. Burton, 5 Ben. 325, 4 N. B. R. 1, Fed. Cas. No. 12,285.

[78] In re Aspinwall, 11 Fed. 136. See Ellet-Kendall Shoe Co. v. Martin, 222 Fed. 851, 138 C. C. A. 277, 34 Am. Bankr. Rep. 502. Where a creditor obtains, in good faith, as security, a receipt for coal in the debtor's yard not separated from the common mass, he may take possession after discovering the insolvency of the debtor. Sherman v. Traders' Nat. Bank, 9 Biss. 216, Fed. Cas. No. 12,770.

[79] In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057.

[80] In re Independent Ins. Co., 2 Low. 187, Fed. Cas. No. 7,019.

[81] In re Baxter, 28 Fed. 452.

property in his own name, is not voidable as a preference,[82] though of course it is otherwise in regard to a sale under a decree which was procured by fraud and imposition practiced on the court.[83] In another case it appeared that the bankrupt was a member of a stock exchange, the rules of which provided that, when a member became insolvent, he should assign his seat to be sold, and that the proceeds should be first applied to the payment of his debts to the members of the exchange, to the exclusion of his other creditors, but the purchaser of the seat could not become a member, or enjoy any of the privileges of membership, unless elected by the exchange. On this state of facts, it was held a member who became insolvent, complied with this rule, and was afterwards adjudged a bankrupt, was not guilty of giving a preference to those creditors whose debts were in this manner paid first; for while his incorporeal right to his seat was indeed property, yet it was subject to certain valid conditions and restrictions, including that of payment to members, and would not vest in his trustee in any event until those conditions had been complied with.[84]

It should further be remarked that a preference is none the less voidable because it was given in and as a part of a general assignment for the benefit of creditors, which assignment is annulled by the adjudication in bankruptcy.[85] And where a debtor enters upon a plan of composition and compromise with all his creditors, if one of them secures full payment while the others receive less, it is a preference voidable under the bankruptcy act,[86] as, where the debtor compromises with all of his creditors except one, whom he promises to pay in full on a large extension of time, transferring to him property as security therefor.[87] But where, pursuant to a contemplated compromise settlement of a bankrupt's debts, defendant, a judgment creditor, was paid a stipulated amount to obtain a discharge of his lien, and he received the same in good faith, and it appeared that the settlement would have been completed but that the bankrupt became insane, and it was then abandoned,

[82] In re Myers, 2 Hughes, 230, Fed. Cas. No. 9,984.

[83] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305. An order in void receivership proceedings whereby the bankrupt's property was transferred to defendant, may, when made within four months of bankruptcy, be vacated as a preference. Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177.

[84] Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264.

[85] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305; Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286. But dividends paid by an assignee under an assignment, made within four months prior to bankruptcy, are not preferences which the creditors must surrender before proving their claims. In re Vorck (D. C.) 235 Fed. 655, 38 Am. Bankr. Rep. 203. See supra, §§ 441, 442.

[86] In re Amory, Fed. Cas. No. 336b; Harrison v. McLaren, 10 N. B. R. 244, Fed. Cas. No. 6,139. And see In re Jacob v. Shantz & Son Co., 205 Fed. 425, 30 Am. Bankr. Rep. 552.

[87] Eefort v. Greely, 6 N. B. R. 433, Fed. Cas. No. 4,260.

it was held that the payment so received was not recoverable as a preference.[88] An several creditors may, with the aid of their debtor, conspire to gain an advantage over other creditors, by a voluntary preference, if the means used are not unlawful, and the preference is made more than four months before the bankruptcy of the debtor.[89]

§ 579. **Procuring or Suffering Judgment.**—By the terms of the present bankruptcy act, a person shall be deemed to have given a preference if, being insolvent, he has "procured or suffered a judgment to be entered against himself." Under the act of 1867, it was an act of preference if the insolvent "procured or suffered any part of his property to be attached, sequestered, or seized on execution." The important difference is that, under the existing statute, it is not necessary that the entry of a judgment should have been followed by the issue or levy of final process; it is sufficient if "the effect of the enforcement of such judgment will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."[90] But so far as concerns the participation of the debtor himself in the transaction, the words of the statute remain the same. He must "procure or suffer" the judgment. And it was laid down by the Supreme Court that something more than passive non-resistance on the part of an insolvent debtor is necessary to invalidate a judgment and levy on his property, when the debt is due and he has no defense. In such case, there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor or defeat the operation of the bankruptcy law. But very slight circumstances which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference, may, by giving color to the whole transaction, render the lien voidable as a preference.[91] It is therefore competent for a creditor to institute a suit against an insol-

[88] Templeton v. Woollens, 200 Fed. 257, 29 Am. Bankr. Rep. 208. And see In re Folb, 91 Fed. 107, 1 Am. Bankr. Rep. 22.

[89] Van Kleeck v. Miller, 19 N. B. R. 484, Fed. Cas. No. 16,860.

[90] Bankruptcy Act 1898, § 60a. See Moore v. John H. Smith & Sons, 205 Fed. 431, 30 Am. Bankr. Rep. 413. The amount paid for property sold under execution within four months before the bankruptcy may be recoverable from the execution creditor as a voidable preference. Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 36 Am. Bankr. Rep. 199.

[91] Wilson v. City Bank of St. Paul, 17 Wall. 473, 21 L. Ed. 723; Parsons v. Caswell, 1 Fed. 74; Henkelman v. Smith, 42 Md. 164, 12 N. B. R. 121; Sleek v. Turner, 76 Pa. St. 142, 10 N. B. R. 580; Kemmerer v. Tool, 81 Pa. St. 467, 12 N. B. R. 334; Mason v. Warthens, 7 W. Va. 532, 14 N. B. R. 346. But see Hyde v. Corrigan, 9 N. B. R. 466, Fed. Cas. No. 6,968, distinguishing the doctrine of Wilson v. City Bank, supra, as to "passive non-resistance," on the ground that that rule is applicable only to a case where the debtor is making "an honest struggle to meet his debts and to avoid the breaking up of his business." See also In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884.

vent debtor and to obtain judgment and issue execution, and unless the bankrupt does some act by which he has participated in some way in the action of the creditor, the preference thereby acquired is valid as against other creditors, so far as it is affected by this particular part of the statute.[92] "A creditor may pursue his insolvent debtor to judgment and execution, with full knowledge of the insolvency, notwithstanding the provisions of the bankruptcy act, provided the debtor does nothing to aid the pursuit. If there be no collusion between the debtor and the creditor, the ordinary remedies of the law are open to the latter."[93] "The mere existence of a desire on the part of a debtor, however strong such a desire, that a particular creditor may succeed by suit, judgment, execution, and levy, in obtaining a preference over other creditors, so that such preference may be maintained even as against proceedings in bankruptcy which may be subsequently commenced, is not sufficient to establish that the debtor procured or suffered his property to be taken on legal process, with intent to prefer such creditor, if the proceedings of the creditor were the usual proceedings in a suit, unaided by any act of the debtor, either by facilitating the proceedings as to time or method,

[92] In re Runzi, 3 Fed. 790. But compare Golden Hill Distilling Co. v. Logue, 243 Fed. 342, 156 C. C. A. 122, 39 Am. Bankr. Rep. 731. Where notes which had been given to a bankrupt were sold under attachment in another state, no preference resulted where there was no transfer by the bankrupt and he did not procure or suffer the judgment to be rendered. De Friece v. Bryant (D. C.) 232 Fed. 233, 37 Am. Bankr. Rep. 275.

[93] Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568. On the difference in meaning between the two words "procure" and "suffer," the following remarks by Blatchford, J., are instructive: "There is a clearly recognized distinction between procuring and suffering. The act of 6 Geo. IV, ch. 16, § 3, provided that if any trader should 'suffer' himself to be arrested for any debt not due, or 'suffer' himself to be outlawed, or 'procure' himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, he might be brought into bankruptcy. In Gibson v. King, 1 Car. & Marsh. 458, a creditor had brought an action against the bankrupt for a debt, and judgment had been suffered to go by default, and an execution had been issued on it, on which the bankrupt's goods had been taken, and the question arose whether 'suffering' the judgment to go by default in the action, and 'suffering' the goods to be taken on the execution on the judgment, was 'procuring' the goods to be taken in execution, within the statute. The court held that the bankrupt had 'suffered' the goods to be taken in execution, but had not 'procured' them to be so taken. The same view of the distinction between the words in the English act was taken in Gore v. Lloyd, 12 Mees. & W. 463. The distinction there maintained by Baron Alderson was that the bankrupt 'procured' his goods to be taken in execution when the initiation of the proceedings came from him, when he was the person who began to procure, when he caused the thing to be done, in the ordinary sense of the word, but that the signing, reluctantly and under strong pressure from a creditor, of a warrant to confess a judgment, under a stipulation that the warrant should not be unnecessarily put in force, was 'suffering,' and not 'procuring,' goods to be taken in execution which were taken on an execution issued on a judgment entered upon the warrant. The English and other decisions as to pressure by a creditor, and as to what it is to 'procure,' have no application to the question of 'suffering.'" In re Black, 2 Ben. 196, 1 N. R R. 353, Fed. Cas. No. 1,457.

or by obstructing other creditors who otherwise would obtain priority."[94]

A debtor does not procure or suffer judgment who merely consents to an amicable action or revival, which gives the creditor no advantage which he could not at once have secured by adversary process,[95] or who merely agrees to give notice to a certain creditor when execution is issued against him and does so notify that creditor.[96] But a judgment by default is prima facie fraudulent and one seeking to retain a preference secured thereby must negative all the circumstances under the statute making such a transfer void.[97] And a judgment obtained by service of process on an absconding debtor who secretly returns within the jurisdiction to permit such service is procured or suffered by him, within the meaning of the statute.[98] So also if the debtor contribute to the rendition of the judgment at an earlier day than, without his aid, it could have been entered,[99] or where a member of an insolvent firm delivers a message at the request of a creditor, though unwillingly, directing an attorney to enter judgment on a judgment note which the firm had previously given,[100] or where the judgment debtor agrees that the sheriff shall place a cashier in charge of his store, and that the proceeds of each day's sales shall be paid over to the sheriff and applied on the execution.[101]

A confession of judgment, or the giving of a warrant of attorney to confess judgment, by an insolvent debtor, with the intention of preferring the particular creditor, may be a voidable preference, and especially where this course is taken for the purpose of enabling that creditor to levy his execution before other creditors can do so.[102] And it has been ruled that a debtor who voluntarily confesses judgment in favor of the creditor, and allows him to issue an execution and to make a levy and sale, resulting in the creditor becoming the purchaser, "transfers" his property within the meaning of the bankruptcy law.[103] And

[94] Brown v. Jefferson County Nat. Bank, 19 Blatchf. 315, 9 Fed. 258.

[95] Kemmerer v. Tool, 81 Pa. St. 467, 12 N. B. R. 334.

[96] Gaskill v. Benton, 8 Fed. 746.

[97] In re Binns, 4 Ben. 152. Fed. Cas. No. 1,422.

[98] Beattie v. Gardner, 4 Ben. 479, 4 N. B. R. 323, Fed. Cas. No. 1,195.

[99] Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164.

[100] In re Benton, 16 N. B. R. 75, Fed. Cas. No. 1,333.

[101] In re Metzger Toy & Novelty Co., 114 Fed. 957, 8 Am. Bankr. Rep. 307.

[102] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Grant v. National Bank of Auburn (D. C.) 232 Fed. 201, 37 Am. Bankr. Rep. 329; Benjamin v. Chandler, 142 Fed. 217, 15 Am. Bankr. Rep. 439; Haughey v. Albin, 2 Bond, 244, 2 N. B. R. 399, Fed. Cas. No. 6,222; Fitch v. McGie, 2 Biss. 163, 2 N. B. R. 531, Fed. Cas. No. 4,835; Zahm v. Fry, 9 N. B. R. 546, Fed. Cas. No. 18,198; Street v. Dawson, 4 N. B. R. 207, Fed. Cas. No. 13,553.

[103] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

the same principles apply in the case of a decree entered by consent.[104] But an order or decree requiring a trustee to pay over money to his successor, made in a proceeding by the cestui que trust to have him removed on the ground of his insolvency, resulting in an adversary decree appointing a new trustee, is not a judgment "procured or suffered" by the insolvent.[105] And the same is true of a judgment which merely confirms an award made more than four months before the bankruptcy of the debtor.[106] And although a judgment by confession may be entered under such circumstances as to make it a voidable preference, yet where it was merely intended as collateral security for the aggregate amount of several existing and valid judgments, its invalidity does not in any way affect the original judgments.[107]

§ 580. Transfers of Property.—The bankruptcy act does not permit an insolvent debtor to transfer any portion of his property in kind to a creditor in settlement of the debt, though it be an honest and valid one, if the effect will be to prefer that creditor over others, and the creditor has reasonable cause to believe that such result will follow.[108] But the term "transfer," as used in the act, includes much more than the turning over of property in settlement of a claim. It is declared to mean "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."[109] Hence a preferential transfer of property may include a mortgage or any other kind of lien voluntarily created by the debtor,[110] or a deed of land delivered with the understanding that it is not to be recorded but held as security,[111] or a bill of sale of a stock of merchandise,[112] or an order

[104] In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551.

[105] Fry v. Pennsylvania Trust Co., 195 Pa. St. 343, 46 Atl. 10.

[106] In re Koslowski, 153 Fed. 823, 18 Am. Bankr. Rep. 723.

[107] Vogle v. Lathrop, 4 N. B. R. 439, Fed. Cas. No. 16,985.

[108] Sherman v. Luckhardt, 96 Mo. App. 320, 70 S. W. 388; In re House, Fed. Cas. No. 6,735. A bill of sale of all his property, executed by a person who is adjudicated a bankrupt within four months thereafter, may be set aside as a preference, though it was intended to protect his creditors. In re Einstein (D. C.) 245 Fed. 189, 40 Am. Bankr. Rep. 507.

[109] Bankruptcy Act 1898, § 1, cl. 25. Where an insolvent person, adjudged bankrupt within four months afterwards, assigned accounts receivable to a creditor, who knew he was receiving a preference, the transaction is voidable by the trustee in bankruptcy. McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702.

[110] Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, 18 Am. Bankr. Rep. 513; MacHenry v. Dwelling Building & Loan Ass'n (D. C.) 259 Fed. 880, 44 Am. Bankr. Rep. 234; In re Ed. W. Wright Lumber Co. (D. C.) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; In re Jones (D. C.) 118 Fed. 673, 9 Am. Bankr. Rep. 262. But the mere filing of an affidavit of renewal of a chattel mortgage within four months prior to bankruptcy of the mortgagor is not a preferential "transfer of property." In re Dagwell (D. C.) 263 Fed. 406, 45 Am. Bankr. Rep. 358.

[111] Ragan v. Donovan, 189 Fed. 138, 26 Am. Bankr. Rep. 311.

[112] W. B. Belknap & Co. v. Lyell, 89 Miss. 197, 42 South. 799. But the record-

drawn by the bankrupt on a third person and accepted by the latter,[113] and an agreement to "transfer" property may be construed as an agreement to "deliver" it.[114] So, where the creditor simply takes possession of property of the debtor, meaning to satisfy his claim out of it, this may constitute a preference,[115] at least where the debtor thereupon gives the creditor a written release.[116] But a preference is not created by the act of a creditor in taking possession of collaterals deposited as security, though within four months before the bankruptcy, where the collateral was set apart years before to secure the debtor's drawing credit.[117] And a sum retained by a corporate creditor, with knowledge of the debtor's insolvency and within four months before his bankruptcy, which sum was due and owing to the bankrupt under an agreement by which the corporation, in paying its employés, was to deduct from their wages the amounts due from them to the bankrupt for supplies furnished by him to them, and was to remit to him the amount so deducted, irrespective of any indebtedness otherwise due by him to the corporation, is not a voidable preference.[118] And the performance of labor by an insolvent debtor for his creditor, for which he is given credit on his indebtedness, is not a transfer of property.[119]

A transfer may constitute a voidable preference under the act although the property is not conveyed directly to the preferred creditor, if the effect of the transaction is to enable him to secure a larger share of the debtor's estate than other creditors of the same class will receive in the bankruptcy.[120] Hence it is sufficient if the transfer is made to a third person for the creditor's benefit,[121] and a debtor cannot escape the effect of giving a preference by passing the conveyance through his wife and having her convey or mortgage it to the creditor.[122] And sim-

ing of a contract of conditional sale under which a bankrupt obtained possession of property is not a transfer of property by him which could be attacked by the trustee as preferential. In re Terrell, 246 Fed. 743, 159 C. C. A. 45, 40 Am. Bankr. Rep. 713.

[113] In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495.

[114] Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935.

[115] Bailey v. Henderson, 9 Ben. 534, Fed. Cas. No. 737.

[116] Collidge v. Ayers, 76 Vt. 405, 57 Atl. 970.

[117] Sexton v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, 28 Am. Bankr. Rep. 85.

[118] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447.

[119] In re Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315.

[120] Western Tie & Timber Co. v. Brown, 129 Fed. 728, 64 C. C. A. 256, 12 Am. Bankr. Rep. 111. But see this case on appeal, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447.

[121] National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042, 28 Am. Bankr. Rep. 218. A conveyance of real estate within four months before bankruptcy, made by the bankrupt to a stockholder of a creditor corporation, who held the same for the company, and paid for it with money which was furnished by the company, and received back by it from the bankrupt, is a voidable preference. Golden & Co. v. Loving, 42 App. D. C. 489.

[122] Gibson v. Dobie, 5 Biss. 198, 14 N. B. R. 156, Fed. Cas. No. 5,394.

ilarly a preference is created where the creditor induces and procures a third person to lend money to the bankrupt with which the creditor's claim is to be satisfied, taking a mortgage on the bankrupt's stock in trade as security.[123] It makes no difference who the creditor may be. The officers of a corporation, for instance, may lawfully lend it money, but cannot take a preferential transfer of its property when it is insolvent.[124] As to the property affected by the transfer, it may be said that the act of a foreign creditor in obtaining a lien on property of the debtor in a foreign country may constitute a preference,[125] but since property of the bankrupt which is exempt under the laws of the state will not in any event constitute a part of his estate in bankruptcy for the purpose of distribution among the creditors, a conveyance or incumbrance of exempt property for the benefit of one particular creditor cannot be said to amount to a preference within the meaning of the statute.[126]

§ 581. Same; Transfer of Property in Substitution or Satisfaction of Lien.—No voidable preference is created where a debtor, though insolvent, transfers or surrenders to a creditor property on which the latter already has a valid lien, in satisfaction and discharge of the debt and the lien securing it, or property in substitution for that on which the lien attaches, provided the property is of no greater value than the amount of the lien, so that the debtor's general estate is not thereby depleted.[127] But it is otherwise, of course, if the value of the property transferred or surrendered is in substantial excess of the creditor's claim,[128] or if the

[123] In re Beerman, 112 Fed. 663, 7 Am. Bankr. Rep. 431.

[124] Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Moody v. Chicago Title & Trust Co., 126 Ill. App. 68; Cullen v. Veasey, 5 Boyce (Del.) 588, 95 Atl. 655.

[125] In re Pollmann, 156 Fed. 221, 19 Am. Bankr. Rep. 474.

[126] Huntington v. Baskerville, 192 Fed. 813, 113 C. C. A. 137, 27 Am. Bankr. Rep. 219; In re Leech, 171 Fed. 591; Vitzthum v. Large, 162 Fed. 685, 20 Am. Bankr. Rep. 666.

[127] Root Mfg. Co. v. Johnson, 219 Fed. 397, 135 C. C. A. 139, 34 Am. Bankr. Rep. 247; In re Federal Biscuit Co., 214 Fed. 221, 130 C. C. A. 635, 32 Am. Bankr. Rep. 612; Ashuelot Bank v. Frost, 19 Fed. 237; Coxe v. Hale, 10 Blatchf. 56, 8 N. B. R. 562, Fed. Cas. No. 3,310; Catlin v. Hoffman, 2 Sawy. 486, 9 N. B. R. 342, Fed. Cas. No. 2,521; Boothe v. Brooks, 12 N. B. R. 398, Fed. Cas. No. 1,650; Hallack v. Tritch, 17 N. B. R. 293, Fed. Cas. No. 5,956; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Posey v. McManis, 28 Tex. Civ. App. 452, 67 S. W. 792; Macdonald v. Ætna Indemnity Co., 90 Conn. 415, 97 Atl. 332; Davis v. Billings, 254 Pa. 574, 99 Atl. 163; Lloyd v. Sichler, 94 Wash. 611, 162 Pac. 979; McKnight v. Shadbolt, 98 Wash. 665, 168 Pac. 473. No preference can be predicated on the fact that the money received from the sale of grain which had been pledged by the bankrupt was not kept physically isolated until paid to the secured creditor, but was deposited in bank with other money of the bankrupt, and a check for the amount immediately given to the creditor. Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531.

[128] Waring v. Buchanan, 19 N. B. R. 502, Fed. Cas. No. 17,176. But a transfer by a bankrupt to a creditor of property of no more value than such creditor's lien thereon and the amount of the claims of certain other creditors of the bankrupt, which he then pays, by agreement with the bankrupt, is not a preference, though such other claims were un-

transaction puts the creditor in a materially better position with reference to the enforcement of his claim.[129] And to justify a transaction of this kind, there must be an actual and valid lien of some kind, not a mere promise or unexecuted agreement to give security.[130] But if a creditor holds a valid and subsisting lien on the debtor's property, and the equity of redemption therein is released to him under such circumstances as to make it a fraudulent preference, though the conveyance is void, this will not divest the lien, but the parties will be remitted to their original position.[131]

§ 582. Restoration of Specific Property or Funds.—A transfer or surrender of property by an insolvent debtor will not constitute a voidable preference where the person receiving it was actually the owner of the property, and no title was vested in the bankrupt in any such sense that it could have been made available for his general creditors.[132] Thus, where a broker buys stock for a customer on a margin, the title to the stock is in the customer, and not in the broker, the latter holding it merely as a pledgee to secure the advances made by him in the purchase. Hence the customer is not a creditor of the broker, and no preference is created by the transfer of the stock to the customer on the settlement of his account,[133] or by the broker's action in redeeming the stock (already pledged by him) and turning it over to the customer on demand.[134] So, a transfer of realty by an insolvent, though made within four months before his bankruptcy, is not a preference if made in good faith to his

secured. Russell's Trustee v. Mayfield Lumber Co., 158 Ky. 219, 164 S. W. 783.

[129] In re Dibblee, 3 Ben. 283, Fed. Cas. No. 3,884.

[130] Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Sharp v. Philadelphia Warehouse Co., 19 N. B. R. 378, Fed. Cas. No. 12,709a; Lacy v. Chandler (Tex. Civ. App.) 163 S. W. 328. Payment by an insolvent to one who assumes an indebtedness of the insolvent therefor is a preference; and so also, where one pays an indebtedness of an insolvent on condition that a mortgage in his name, which has been paid, shall remain effective. McKnight v. Shadbolt, 98 Wash. 665, 168 Pac. 473.

[131] Avery v. Hackley, 20 Wall. 407, 22 L. Ed. 385.

[132] Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; In re Wright-Dana Hardware Co. (D. C.) 205 Fed. 335, 30 Am. Bankr. Rep. 582; Bradley, Clark & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Sears v. Gilman, 199 Mass. 384, 85 N. E. 466. Compare Smith v. Tostevin, 247 Fed. 102, 159 C. C. A. 320, 41 Am. Bankr. Rep. 212. Where a bank purchased with its own funds silk for certain bankrupts, taking title in its own name, and delivered the silk to the bankrupts under a trust receipt binding the latter to hold the goods or their proceeds for the bank until the price was paid, it was considered that, as the title had never passed to the bankrupts, their agreement while insolvent to return the goods to the bank was not a preference. In re Killian Mfg. Co. (D. C.) 209 Fed. 498.

[133] Robinson v. Roe, 233 Fed. 936, 147 C. C. A. 610, 38 Am. Bankr. Rep. 26; Richardson v. Shaw, 147 Fed. 659, 77 C. C. A. 643, 16 Am. Bankr. Rep. 842; In re Graff (D. C.) 117 Fed. 343, 8 Am. Bankr. Rep. 744.

[134] Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, 19 Am. Bankr. Rep. 717; Robinson v. Roe, 233 Fed. 936, 147 C. C. A. 610, 38 Am. Bankr. Rep. 26.

wife in replacement of her dotal property alienated by him, and the subject of the transfer does not exceed in value such dotal property.[135] Money, as well as other property, may be subject to this rule.[136] Thus, the return of excessive margins by an insolvent stockbroker to a customer does not constitute a preference.[137] So where money is placed in the hands of one who afterwards becomes bankrupt, but on the agreement that it shall be used for a particular purpose, and it is not so used, but is returned to the owner, this does not create a preference.[138] But it is necessary to distinguish the case where money is delivered to the bankrupt under such circumstances that the person giving it becomes simply a general creditor for the amount. Thus, where it appeared that the defendant in an action to recover a preference had discounted a note for the bankrupt, but discovered the next day that an indorsement on the note was forged and called on the bankrupt to return the money, but the bankrupt was unable to do this, but gave the defendant a postdated check, which the latter accepted, and this check was shortly paid, it was held that this transaction constituted a preference and could not be upheld on the theory that the defendant was merely procuring a return of his money, for, by accepting a postdated check, which was paid from the bankrupt's general funds, he had accepted the position of a general creditor.[139]

So, also, the general rule does not apply where goods have passed to the bankrupt under a contract of sale. It is an unlawful preference if the seller accepts a return of the goods or a part of them in settlement of his claim, unless he has retained title in himself by some lawful reservation or agreement.[140] It has been held, however, that where goods are obtained on credit by an insolvent buyer and by means of false pretenses, the seller's recovery of them before they have been unpacked does not work a preference under the bankruptcy law.[141]

§ 583. Same; Trust Funds and Moneys Converted or Embezzled.—Questions often arise as to the creation of a preference where an insol-

[135] Gomila v. Wilcombe, 151 Fed. 470, 81 C. C. A. 268, 18 Am. Bankr. Rep. 143.

[136] Wallerstein v. Gallagher (D. C.) 236 Fed. 602, 38 Am. Bankr. Rep. 287.

[137] Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, 19 Am. Bankr. Rep. 717.

[138] Sharp v. Simonitsch, 107 Minn. 133, 119 N. W. 790; Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501.

[139] Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632.

[140] Benjamin v. Buell (C. C. A.) 268 Fed. 792, 46 Am. Bankr. Rep. 404; Plummer v. Myers, 137 Fed. 660, 14 Am. Bankr. Rep. 805; West v. Fulling, 36 Ind. App. 617, 76 N. E. 325. As to the reclamation by a creditor of property held by the bankrupt under a contract of conditional sale, see John Deere Plow Co. v. Edgar Farmer Store Co., 154 Wis. 490, 143 N. W. 194; In re Bennett (D. C.) 264 Fed. 533. And see, supra, § 358.

[141] Mulroney Mfg. Co. v. Weeks, 185 Iowa, 714, 171 N. W. 36.

vent person has been forced to restore or make good funds which he has stolen or embezzled, or which he has misappropriated to his own use while holding them in the character of a trustee. The general rule is that if the particular fund has been kept separate and apart from the bankrupt's own money, or if it is distinctly traceable into property or other funds into which it has been converted, the owner may follow it and reclaim it from the trustee in bankruptcy, on the theory that it does not constitute any part of the assets in bankruptcy. From this it follows that if the fund (or its avails) is surrendered or restored to the owner before bankruptcy intervenes, it cannot be said to constitute the giving of a preference.[142] But if the person entitled to the fund, having knowledge of the embezzlement or conversion, and of the debtor's insolvency, accepts a payment out of the latter's general funds or a conveyance of property or a security offered, this is an election to treat the misappropriation as creating a debt, and consequently he will stand in no better position than any general creditor.[143] Under these circumstances, therefore, a payment or transfer of property, or the giving of a mortgage or other security, will constitute a voidable preference, supposing the other elements of a preference to be present.[144] And the United States Supreme Court has ruled that, independently of his liability on any bond, there is an obligation of a contractual nature resting upon a defaulting testamentary trustee to restore to the trust estate the value of assets embezzled, and this obligation is a provable debt in bankruptcy. Hence, where one is a trustee in several trusts, and knowing himself to be insolvent, and within four months prior to his bankruptcy, he transfers his own property from himself individually to one of those trusts and to himself in the character of trustee therein, to make good a shortage, and the effect is to enable that trust to recover a larger share of its debt than the others, a voidable preference is given.[145]

§ 584. Giving of Present Consideration; Security for Present Loan or Future Advances.—"An insolvent person may properly make efforts

[142] Block v. Rice, 167 Fed. 693, 21 Am. Bankr. Rep. 691; McNaboe v. Columbian Mfg. Co., 153 Fed. 967, 83 C. C. A. 81, 18 Am. Bankr. Rep. 684; Goode v. Elwood Lodge, 160 Ind. 251, 66 N. E. 742. And see supra, § 354.

[143] Atherton v. Green, 179 Fed. 806, 103 C. C. A. 298, 24 Am. Bankr. Rep. 650.

[144] Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413; In re Dorr, 196 Fed. 292, 28 Am. Bankr. Rep. 505; Burgoyne v. McKillip, 182 Fed. 452, 25 Am. Bankr. Rep. 387; In re Kearney, 167 Fed. 995, 21 Am. Bankr. Rep. 721; Smith v. Township of Au Gres, 150 Fed. 257, 17 Am. Bankr. Rep. 745. Where a bankrupt which assigned accounts to defendants converted payments received on such accounts, but defendant could not trace such conversions into other unassigned accounts, it cannot, on the theory of a trust, sustain a subsequent preferential assignment of other accounts. McGill v. Commercial Credit Co. (D. C.) 213 Fed. 637, 39 Am. Bankr. Rep. 702.

[145] Clarke v. Rogers, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953, 30 Am. Bankr. Rep. 39.

to extricate himself from his embarrassments, and therefore he may borrow money and give, at the time, security therefor, provided always the transaction be free from fraud in fact and upon the bankruptcy act. And hence it is a settled principle of bankruptcy law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or the policy of the bankruptcy act. This is manifestly right, since the power to raise ready money may save the party from bankruptcy and ruin, and since his creditors are not injured nor his estate impaired, because he gets a present equivalent for the debt he creates and the security he gives." [146] In effect, an unlawful preference is created, within the meaning of the act, only when a transfer is made or security given for a pre-existing debt.[147] This the creditor is not allowed to exact, at least if he has reasonable cause to believe that he is securing a preference. But at the time when a debt is created, the creditor has the right to dictate the terms on which he will part with his money or property, and he may therefore demand that he shall first be secured to such an extent as will satisfy him, and with this the bankruptcy act does not interfere.[148] Moreover, the statute expressly provides that "liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." [149] It is therefore a well-settled rule that a creditor who takes security, though the debtor is insolvent and though his bankruptcy follows within four months, does not receive a preference which is voidable under the act, if the consideration was a loan or advance of money to the bankrupt made at the same time with the giving of the security.[150] So a mortgage made in good faith to secure future sales of

[146] Darby v. Boatmen's Sav. Inst., 1 Dill. 141, Fed. Cas. No. 3,571. Thus, where the directors of an insolvent corporation, in good faith and with the intention of saving the business, borrowed money from a director and a stockholder to meet the most pressing obligations, and executed mortgages on all of the corporate assets to secure the same, it was held, on the subsequent bankruptcy of the corporation, that the mortgages could not be questioned as preferential. In re Lake Chelan Land Co., 257 Fed. 497, 168 C. C. A. 501, 5 A. L. R. 557, 44 Am. Bankr. Rep. 14.

[147] In re Perpall (C. C. A.) 271 Fed. 466, 46 Am. Bankr. Rep. 302; In re Clifford (C. C. A.) 136 Fed. 475, 14 Am. Bankr. Rep. 281; William Schuette & Co. v. Swank, 265 Pa. 576, 109 Atl. 531; In re Busby (D. C.) 124 Fed. 469, 10 Am. Bankr. Rep. 650. Whether a debt, to secure which a lien was created within four months of bankruptcy, was a pre-existing debt must be determined as of the date of the creation of the lien. In re Mossler Co., 239 Fed. 262, 152 C. C. A. 250, 38 Am. Bankr. Rep. 604.

[148] In re Busby (D. C.) 124 Fed. 469, 10 Am. Bankr. Rep. 650.

[149] Bankruptcy Act 1898, § 67d.

[150] Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, 38 Am. Bankr. Rep. 664; Lake View State Bank v. Jones, 242 Fed. 821, 155 C. C. A. 409, 40 Am. Bankr. Rep. 148; Dodge v. Harris, 224 Fed. 434, 140 C. C. A. 128; Withoft v. Andrews (D. C.) 217 Fed. 421, 33 Am. Bankr. Rep. 536; Tiffany v. Boatmen's Sav. Inst., 18 Wall. 375, 21 L. Ed.

goods to the mortgagor is valid to the extent of the advances actually made, and to such extent is not defeated but protected by the bankruptcy act.[151] And where new sales succeed payments, and the net result is to increase the value of the debtor's estate, payments made by an insolvent debtor on a running account are not to be considered preferential.[152] So a mortgage given for money borrowed at the time to pay the purchase price of the property mortgaged, whether or not the same identical money is used to make the payment, is in effect a purchase-money mortgage and entitled to high rank and protection.[153] The same principle applies where the transaction takes the form of a transfer of property, rather than a security. A person may sell or exchange his property, though he is insolvent at the time, if it is done in good faith and with no fraudulent design as against his creditors.[154] And one who takes a conveyance of such property, acting in equal good faith, and who has already advanced the money therefor, or gives a present and adequate consideration for it, is not chargeable with receiving a preference.[155] And either in the case of a security or a conveyance, it is not necessary

868; Lindley v. Ross, 200 Fed. 733, 29 Am. Bankr. Rep. 610; In re Empire Cork Co., 193 Fed. 225; In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444; Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55, 24 Am. Bankr. Rep. 316; In re Hersey, 171 Fed. 1004, 22 Am. Bankr. Rep. 863; In re Bartlett, 172 Fed. 679, 22 Am. Bankr. Rep. 891; In re Farmers' Supply Co., 170 Fed. 502, 22 Am. Bankr. Rep. 460; McDonald v. Clearwater Shortline Ry. Co., 164 Fed. 1007, 21 Am. Bankr. Rep. 182; Crim v. Woodford, 136 Fed. 34, 68 C. C. A. 584, 14 Am. Bankr. Rep. 302; Farmers' Bank of Edgefield v. C. D. Carr & Co., 127 Fed. 690, 62 C. C. A. 446, 11 Am. Bankr. Rep. 733; Young v. Upson, 115 Fed. 192, 8 Am. Bankr. Rep. 377; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528; In re Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; In re Little River Lumber Co., 92 Fed. 585, 1 Am. Bankr. Rep. 483; Neill v. Barbaree, 135 Ga. 771, 70 S. E. 638; Crooks v. People's Nat. Bank, 34 Misc. Rep. 450, 70 N. Y. Supp. 271; Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; O'Connell v. City of Worcester, 225 Mass. 159, 114 N. E. 201; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; McNamara v. Farnsworth, 106 Wash. 523, 180 Pac. 466.

[151] Marvin v. Chambers, 12 Blatchf. 495, 13 N. B. R. 77, Fed. Cas. No. 9,179; In re Watkinson, 142 Fed. 782, 16 Am. Bankr. Rep. 38; Peterson v. Nash Bros., 112 Fed. 311, 50 C. C. A. 260, 55 L. R. A. 344, 7 Am. Bankr. Rep. 181.

[152] Joseph Wild & Co. v. Provident Life & Trust Co., 153 Fed. 562, 82 C. C. A. 516, 18 Am. Bankr. Rep. 506.

[153] In re Franklin, 151 Fed. 642, 18 Am. Bankr. Rep. 218.

[154] Blake v. Thwing, 185 Ill. App. 187. Where one who had been fraudulently induced to sell goods on credit, accepted from the buyer, within four months before the latter's bankruptcy, a transfer of accounts in payment for the goods, it was held that the transfer was made in consideration of the release of the right to rescind and recover the goods, and therefore was not a preference. Illinois Parlor Frame Co. v. Goldman, 257 Fed. 300, 168 C. C. A. 384, 43 Am. Bankr. Rep. 287.

[155] Ernst v. Mechanics' & Metals Nat. Bank (C. C. A.) 201 Fed. 664, 29 Am. Bankr. Rep. 289; Mills v. Virginia-Carolina Lumber Co., 164 Fed. 168, 20 Am. Bankr. Rep. 750; In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057; Harrison v. McLaren, 10 N. B. R. 244, Fed. Cas. No. 6,139; Sparhawk v. Richards, 12 N. B. R. 74, Fed. Cas. No. 13,205; Weeks v. Spooner, 142 N. C. 479, 55 S. E. 432. But see Kerr v. Melum, 27 S. D. 208, 130 N. W. 83.

that the transfer and the giving of the consideration should be exactly contemporaneous. For an advance will be considered a present consideration for a conveyance made within a reasonable time thereafter and in pursuance of a prior agreement.[156]

But it is strictly necessary that the whole transaction should be entirely free from fraud. If one lends money to an insolvent debtor (whose bankruptcy follows within four months), and knows at the time that the borrower's purpose is not to use the money in supporting his credit or carrying on his business, but to use it in paying off one of the creditors, thereby giving a preference, the lender is so far affected by the fraudulent purpose that any security given to him for the loan will be voidable at the suit of the trustee in bankruptcy.[157] And it seems that actual knowledge on the part of the lender is not necessary to produce this result, if the circumstances were so unusual and suspicious as to lay upon him the duty of making reasonable inquiries concerning the destination of the money, which inquiries would have enlightened him as to the debtor's purpose.[158] Further, if the consideration for a security or transfer, though contemporaneous with it, was illegal, as being contrary to law, to good morals, or to public policy, it will not support the lien or conveyance.[159]

Where it appears that the transfer or security was given in part to secure a pre-existing debt, and in part to secure a new advance of money made at the same time with it, and there was no actual fraud in the transaction as to the other creditors or upon the bankruptcy act, the creditor will be entitled to enforce his security against the estate of the debtor in bankruptcy to the extent of the money advanced at the time, although it is void as a preference so far as concerns the pre-existing debt.[160] Thus, an increase in a mortgage lien on a bankrupt's property, supported by a new and adequate consideration, and not lessening his estate or impairing in any respect the fund available to pay general creditors, must be sustained, although made within four months prior to

[156] Douglass v. Vogeler, 6 Fed. 53; Gattman v. Honea, 12 N. B. R. 493, Fed. Cas. No. 5,271; In re Sutherland Co. (D. C.) 245 Fed. 663, 40 Am. Bankr. Rep. 305.

[157] Bucknam v. Goss, 1 Hask. 630, 13 N. B. R. 337, Fed. Cas. No. 2,097; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678; Sherrill v. Hutson, 187 Ala. 189, 65 South. 538.

[158] Ex parte Mendell, 1 Low. 506, 4 N. B. R. 302, Fed. Cas. No. 9,418; Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437.

[159] Sharp v. Philadelphia Warehouse Co., 10 Fed. 379; Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174.

[160] In re Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384; In re Hull, 115 Fed. 858, 8 Am. Bankr. Rep. 302; In re Dismal Swamp Contracting Co., 135 Fed. 415, 14 Am. Bankr. Rep. 175; In re First Nat. Bank, 155 Fed. 100, 84 C. C. A. 16, 18 Am. Bankr. Rep. 766; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219. But see Tuttle v. Truax, 1 N. B. R. 601, Fed. Cas. No. 14,277.

his bankruptcy.[161] But the bankruptcy law cannot be evaded by a pretense of advancing an additional consideration which bears no reasonable relation to the existing indebtedness. Thus, an assignment of collateral by an insolvent debtor with intent to give a preference to a creditor who has reasonable grounds to believe that a preference is intended, made a short time before an adjudication of bankruptcy, as security for a pre-existing debt, and also for a small additional loan, is void as to the whole.[162]

§ 585. **Effect of Prior Agreement to Give Security or Make Transfer.**—It has often been ruled that, where an agreement is made or a promise given, at the time when money is loaned or advanced, that a transfer of property shall be made or a security given to the lender, the subsequent execution of the transfer or giving of security does not constitute an illegal preference, though it takes place at a time when the debtor is insolvent and within four months prior to his bankruptcy.[163] But on the other hand, there are important decisions to the effect that a transfer of property to a creditor by an insolvent debtor four months prior to his bankruptcy, which would otherwise constitute a voidable preference, is not deprived of that character by the fact that it was made pursuant to a prior agreement made more than four months before the bankruptcy.[164] The true doctrine appears to be that if the promise or agreement was of such a specific nature and related to such specific property as to give rise to an inchoate or equitable lien (in advance of its execution) then the creation of a specific lien at a later time, in accordance with the prior promise, will not violate the bankruptcy law.[165] But

[161] State Bank of Williamson v. Fish, 120 N. Y. Supp. 365.

[162] Grannis v. Beardsley, Fed. Cas. No. 5,688.

[163] Tomlinson v. Bank of Lexington, 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; Ryttenberg v. Schefer, 131 Fed. 313, 11 Am. Bankr. Rep. 652; Payne v. Solomon, 14 N. B. R. 162, Fed. Cas. No. 10,856; In re Wood, 5 N. B. R. 421, Fed. Cas. No. 17,937; Burdick v. Jackson, 7 Hun (N. Y.) 488, 15 N. B. R. 318; M. & M. National Bank v. Brady's Bend Iron Co., 8 Phila. (Pa.) 171, 5 N. B. R. 491, Fed. Cas. No. 9,018; Smoot v. Morehouse, 8 Ala. 370, 42 Am. Dec. 644; In re Metropolitan Dairy Co., 224 Fed. 444, 140 C. C. A. 646, 35 Am. Bankr. Rep. 466.

[164] Citizens' Trust Co. v. Tilt, 200 Fed. 410, 118 C. C. A. 562, 29 Am. Bankr. Rep. 906; Lathrop Bank v. Holland, 205 Fed. 143, 30 Am. Bankr. Rep. 62; In re Thomas, 199 Fed. 214, 29 Am. Bankr. Rep. 945; Tilt v. Citizens' Trust Co., 191 Fed. 441, 27 Am. Bankr. Rep. 320; In re Smith 176 Fed. 426, 23 Am. Bankr. Rep. 864; In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259; In re Dismal Swamp Contracting Co., 135 Fed. 415, 14 Am. Bankr. Rep. 175; In re Mandel, 127 Fed. 863, affirmed 135 Fed. 1021, 68 C. C. A. 546; In re Ronk, 111 Fed. 154, 7 Am. Bankr. Rep. 31; Second Nat. Bank v. Hunt, 11 Wall. 391, 20 L. Ed. 190; In re Connor, 1 Low. 532, Fed. Cas. No. 3,118; Lloyd v. Strobridge, 16 N. B. R. 197, Fed. Cas. No. 8,435; Chapman v. Hunt, 254 Fed. 708, 166 C. C. A. 214, 42 Am. Bankr. Rep. 509; In re Herman (D. C.) 207 Fed. 594, 31 Am. Bankr. Rep. 243; John Agnew Co. v. Board of Education of City of Paterson, 83 N. J. Eq. 49, 89 Atl. 1046.

[165] Johnson v. Root Mfg. Co., 241 U. S. 160, 36 Sup. Ct. 520, 60 L. Ed. 934,

these conditions are not met by a general parol agreement, entered into when the debt was contracted, not pledging any specific property, but merely that security should be given when required,[166] or if the debtor should become financially embarrassed.[167] So, a mere promise by the debtor, at the time the debt was contracted, to give a mortgage to secure it, but without specifying the nature of the mortgage or the property on which it was to be given, does not create an equitable mortgage, and the execution of a mortgage on a subsequent renewal of the debt, at a time when the debtor is insolvent and within four months before his bankruptcy, constitutes a transfer of property to secure an antecedent debt, and creates a preference.[168] In other words, the prior promise must contemplate the giving of a specific and definite security, not merely "some" security; it must be such an agreement as could be enforced by a bill for specific performance.[169] An agreement that the creditor shall have a general lien on the property of the debtor, a corporation, will not suffice.[170] And an agreement to pledge personal property as security for a debt is not executed where the goods are not delivered to the creditor nor set apart and treated as his property, so that where the creditor takes possession of the property shortly before the filing of a petition in bankruptcy, the transaction is voidable as a preference.[171] And an agreement, while negotiating a loan, to make repayment out of a certain fund, does not create a lien on the fund; and hence when repayment is made out of it within four months before a proceeding in bankruptcy, it will be deemed to be preferential and voidable at the suit of the trustee.[172]

§ 586. **Exchange or Substitution of Securities.**—An exchange or substitution of one valid security for another does not create an unlawful preference, though occurring when the debtor is insolvent and within

36 Am. Bankr. Rep. 764; Sabin v. Camp, 98 Fed. 974, 3 Am. Bankr. Rep. 578; Stover v. Kennedy, Fed. Cas. No. 13,510. And see Gage Lumber Co. v. McEldowney (C. C. A.) 207 Fed. 255, 30 Am. Bankr. Rep. 251. Where the owner of a mercantile business assigns to a creditor a fire policy to enable him to collect the same and apply it in payment of a prior loan, the assignment is not an unlawful preference, though made within four months of bankruptcy, where it was made pursuant to a prior agreement by which the policy was pledged as security for advances. Hecker v. Commercial State Bank, 35 N. D. 12, 159 N. W. 97.

[166] In re Connor, 1 Low. 532, Fed. Cas. No. 3,118; Southwick v. Whipple, 2 Fed. 770.

[167] Sebring v. Wellington, 63 App. Div. 498, 71 N. Y. Supp. 788. But compare Stennick v. Jones, 252 Fed. 345, 164 C. C. A. 269.

[168] Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555, 10 Am. Bankr. Rep. 616.

[169] In re Jackson Iron Mfg. Co., 15 N. B. R. 438, Fed. Cas. No. 7,153.

[170] Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462.

[171] In re Sheridan, 98 Fed. 406, 3 Am. Bankr. Rep. 554; In re Arkonia Fabric Mfg. Co., 151 Fed. 914, 18 Am. Bankr. Rep. 470. But compare In re Harvey (D. C.) 212 Fed. 340, 32 Am. Bankr. Rep. 337.

[172] Torrance v. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. 235.

four months prior to his bankruptcy, provided the new security is not of greater value than the old and does not put the creditor in better position with reference to enforcing his claim, since, in this case, nothing is taken away from the general creditors of the bankrupt.[173] Within this rule, the giving of a mortgage or pledge is not a preference when it is executed upon a renewal of the debt or loan, which was originally secured by a like mortgage or pledge.[174] Nor is a preference created by the substitution and recording of a mortgage correcting a mistake in a prior unrecorded mortgage,[175] or in place of one not formally executed;[176] nor by the release of pledged property and the taking of a pledge on other property to secure the same debt,[177] or the substitution of different collaterals for those already held by the creditor;[178] nor by the giving of a chattel mortgage in place of a prior valid bill of sale of the same property,[179] or in place of collateral security;[180] nor by a confession of judgment for a debt already secured by a prior valid lien;[181] nor by the substitution of a deed of trust for a mechanic's lien on the same property;[182] nor by a mere change in the form of the obligation

[173] Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Douglass v. Vogeler, 6 Fed. 53; Brett v. Carter, 2 Low. 458, 14 N. B. R. 301, Fed. Cas. No. 1,844; Albany Exchange Bank v. Johnson, 5 Law Rep. 313, Fed. Cas. No. 133; Sawyer v. Turpin, Holmes, 226, Fed. Cas. No. 12,409; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304; Hutchinson v. Murchie, 74 Me. 187. See Oberneier v. Kass, 219 Fed. 529, 135 C. C. A. 279, 34 Am. Bankr. Rep. 37. A preferential assignment of accounts within four months prior to bankruptcy cannot be sustained as a substitution for accounts theretofore assigned, where it appears that the previously assigned accounts had been collected by the bankrupt, with the assignee's consent, before the later assignment. Wolfe v. Bank of Anderson, 238 Fed. 343, 151 C. C. A. 359, 38 Am. Bankr. Rep. 387.

[174] Hagan v. McNeil, 253 Fed. 716, 165 C. C. A. 310, 41 Am. Bankr. Rep. 792; In re Noel (D. C.) 137 Fed. 694, 14 Am. Bankr. Rep. 715; Chattanooga Nat. Bank v. Rome Iron Co. (C. C.) 102 Fed. 755, 4 Am. Bankr. Rep. 441; In re Doran, Fed. Cas. No. 4,000.

[175] Player v. Lippincott, 4 Dill. 124, Fed. Cas. No. 11,223.

[176] Stewart v. Hoffman, 31 Mont. 190, 77 Pac. 689, 81 Pac. 3. The bankruptcy act does not give the trustee a lien prior to the lien of a bank to which a written chattel mortgage was given shortly before bankruptcy, in the place of a previous oral mortgage which was valid under the laws of the state except as against innocent purchasers and lien creditors. Border Nat. Bank v. Coupland, 240 Fed. 355, 153 C. C. A. 281.

[177] Perry v. Booth, 67 App. Div. 235, 73 N. Y. Supp. 216. But see Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974, 11 Am. Bankr. Rep. 200. Where bankrupt conveyed land as security by deed which was not recorded, and within four months before bankruptcy conveyed other land upon surrender of the unrecorded deed and notes evidencing indebtedness, it was not a preference. Marsh v. Leseman, 242 Fed. 484, 155 C. C. A. 260, 40 Am. Bankr. Rep. 97.

[178] In re Reese-Hammond Fire Brick Co., 181 Fed. 641, 25 Am. Bankr. Rep. 323.

[179] Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235. But a chattel mortgage is voidable as a preference, where the prior security was a conditional contract of sale, which was invalid because not recorded. L. A. Becker Co. v. Gill (C. C. A.) 206 Fed. 36, 30 Am. Bankr. Rep. 429.

[180] In re Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528.

[181] Reber v. Gundy, 13 Fed. 53.

[182] In re Weaver, 9 N. B. R. 132, Fed. Cas. No. 17,307.

from an account to a note.[183] So, where the bankrupt's debt consists of a sum of money with accumulated interest, some time overdue, secured by a valid mortgage, and the parties have an accounting and compute the amount due to date for both principal and interest, and a new mortgage is given for the sum so ascertained, upon the same property, the old mortgage being canceled, this is not to be regarded as an unlawful preference, though done within the time limited before the debtor's bankruptcy.[184] And a creditor who has obtained a valid lien by execution on property of greater value than the amount of the judgment may receive from the debtor bills receivable, accounts, and cash up to the amount of the execution, without violating the bankruptcy law, if the execution is thereupon released and the judgment satisfied.[185] And a broker who holds stocks of a customer as security for the money advanced in their purchase, does not gain a preference by selling the stocks and applying the proceeds on his claim.[186]

But where a loan of money is simply evidenced by an indorsed promissory note, the substitution for it of a bond and mortgage is not such an exchange of securities as will prevent the mortgage being considered a preference, the other elements being present.[187] And a preference may be created by the substitution of one note for another, where that last given is made by a different party or is indorsed with a better name or matures earlier,[188] or enables the creditor more easily or quickly to obtain judgment and levy on the debtor's property.[189] Still it does not necessarily follow that the new security is voidable to its entire extent. Where a debtor gives a mortgage in exchange or substitution for an existing valid mortgage, but of greater value, it may be voidable by his trustee in bankruptcy, but only as to such excess of value.[190]

§ 587. **Payments by Debtor.**—Payment of a debt in money is a "transfer" of property within the meaning of the bankruptcy law, and if made under such circumstances as would constitute a preference in the case of a transfer of any other form of property, may be recovered by the debtor's trustee in bankruptcy.[191] It is immaterial in what form

[183] O'Connor v. Parker, 23 Mich. 22, 4 N. B. R. 713.

[184] Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766. But see In re Jordon, 9 N. B. R. 416, Fed. Cas. No. 7,529; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475.

[185] Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Livingston v. Bruce, 1 Blatchf. 318, Fed. Cas. No. 8,410.

[186] In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835.

[187] In re Hirschowitz, 199 Fed. 202, 28 Am. Bankr. Rep. 571; In re Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555.

[188] McAtee v. Shade, 185 Fed. 442, 26 Am. Bankr. Rep. 151; In re Lane, 2 Low. 333, 10 N. B. R. 135, Fed. Cas. No. 8,044; In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650.

[189] Loudon v. First Nat. Bank, 2 Hughes, 420, 15 N. B. R. 476, Fed. Cas. No. 8,525.

[190] In re Manning (D. C.) 123 Fed. 181, 10 Am. Bankr. Rep. 500.

[191] West Philadelphia Bank v. Dickson, 95 U. S. 180, 24 L. Ed. 407; Pirie v. Chicago Title & Trust Co., 182 U. S.

the payment is made, whether in cash or by a certified check,[192] or by the acceptance of a draft drawn on the debtor by the creditor,[193] or an order on a third person to pay to the creditor money which is due to the debtor,[194] or by giving a lien on property from which the creditor realizes his debt in cash.[195] So, the declaration of a dividend by a corporation, with the understanding that the treasurer's portion of it should be returned to the corporation in settlement of his indebtedness to it, which was done, constitutes a preference recoverable by the treasurer's trustee in bankruptcy.[196] And where creditors of a bankrupt company, with knowledge of its insolvency, placed a representative in charge, and furnished goods on credit to replenish its stock, and would have succeeded in re-establishing the business had not the issuance of execution by another creditor precipitated bankruptcy, it was held that payments made for goods so furnished within four months prior to the adjudication were preferential.[197]

438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; D. C. Wise Coal Co. v. Small, 225 Fed. 524, 140 C. C. A. 508, 35 Am. Bankr. Rep. 682; Scheuer v. Katzoff (D. C.) 233 Fed. 473, 37 Am. Bankr. Rep. 476; In re Miller (D. C.) 221 Fed. 471, 34 Am. Bankr. Rep. 275; In re W. A. Silvernail Co. (D. C.) 218 Fed. 979, 33 Am. Bankr. Rep. 59; Vollmar v. Plage, 186 Fed. 598, 26 Am. Bankr. Rep. 590; In re Rice, 164 Fed. 514, 21 Am. Bankr. Rep. 211; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; Wright v. William Skinner Mfg. Co., 162 Fed. 315, 89 C. C. A. 23, 20 Am. Bankr. Rep. 527; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re John Morrow & Co., 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Colton Export & Import Co., 121 Fed. 663, 57 C. C. A. 417, 10 Am. Bankr. Rep. 14; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; In re Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; In re Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202; Strobel & Wilken Co. v. Knost, 99 Fed. 409, 3 Am. Bankr. Rep. 631; In re Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Ft. Wayne Electric Corp., 96 Fed. 803, 3 Am. Bankr. Rep. 186; In re Baxter, 25 Fed. 700; Metcalf v. Officer, 2 Fed. 640; Paige v. Loring, Holmes, 275, Fed. Cas. No. 10,672; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Landry v. Andrews, 22 R. I. 597, 48 Atl. 1036; Chism v. Citizens' Bank, 77 Miss. 599, 27 South. 637; Sherman v. Luckhardt, 96 Mo. App. 320, 70 S. W. 388; Wright v. Cotten, 140 N. C. 1, 52 S. E. 141; West v. Bank of Lahoma, 16 Okl. 328, 85 Pac. 469; Rogers v. American Halibut Co., 216 Mass. 227, 103 N. E. 689; Schuetz v. International Harvester Co., 167 Iowa, 634, 149 N. W. 855. Where the bankrupt was accustomed to deposit in a bank checks drawn on other banks, and immediately thereafter to check against such deposits, without waiting to see whether the checks were good, and the bank, which was required by the clearing house to make good worthless checks credited by it, required payments from the bankrupt to protect itself against excessive use of its cash reserves, it was held that there was no indebtedness from the bankrupt to the bank, and such payments were not preferences. Snipes v. Mutual Trust Co. (D. C.) 270 Fed. 318, 46 Am. Bankr. Rep. 546.

[192] Cannon v. James M. Bell Co., 34 Misc. Rep. 734, 70 N. Y. Supp. 1024.

[193] Fox v. Gardner, 21 Wall. 475, 22 L. Ed. 685.

[194] In re The Leader, 190 Fed. 624, 26 Am. Bankr. Rep. 668.

[195] In re Belding, 116 Fed. 1016, 8 Am. Bankr. Rep. 718.

[196] Arthur v. Harrington (D. C.) 211 Fed. 215, 32 Am. Bankr. Rep. 216.

[197] In re Farmers' Store & Supply Co.

Nor does it affect the case that the payment is not made directly into the creditor's own hands, but reaches him through one or more intermediaries, as where the debtor's check passes through several banks and a clearing house and is finally credited to the creditor.[198] So where a creditor of the bankrupt assigns his account to a purchaser of the bankrupt's property, under an arrangement whereby such purchaser pays the claim, the legal effect is to appropriate out of the assets of the bankrupt the amount used in satisfying such claim by the purchaser assuming the liability, and an unlawful preference results therefrom.[199] This is also the case where the paying teller of a bank, claiming to be its creditor, draws his check and pays himself the amount out of the funds on hand, just before the bank closes its doors.[200] And where a bank which acts as agent for another bank for clearing house purposes pays, upon the day of its failure, to the latter, which has knowledge of its insolvency, deposits which have been made on its general account to meet checks in the clearing house, such payment is an illegal preference.[201] And where the president and general manager of a bankrupt corporation acts for it in purchasing certain accounts against it, he can only charge the corporation for the amount actually paid by him for the acounts, and must account to the trustee in bankruptcy for all profits made.[202] And a trustee in bankruptcy is not precluded from recovering, from the payee of a note, money paid by the bankrupt on the note within four months before his adjudication, by reason of the fact that there is a solvent indorser on the note.[203]

But the rule must not be applied with unreasonable strictness. There is no violation of the law against preferences where a debtor turns over money to his wife to be used, and which is in fact used, by her in defraying necessary household and family expenses, though she is also a creditor of his.[204] Nor is the payment of house rent or rent of a store the giving of a preference where there is no intention to cheat other

(D. C.) 214 Fed. 505, 32 Am. Bankr. Rep. 638.

[198] In re Lyon, 114 Fed. 326, 7 Am. Bankr. Rep. 412; In re Hunter Arms Co. (D. C.) 226 Fed. 866, 35 Am. Bankr. Rep. 883.

[199] Hackney v. Hargreaves Bros., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Rogers v. Fidelity Sav. Bank & Loan Co., 172 Fed. 735, 23 Am. Bankr. Rep. 1.

[200] In re Plant, 148 Fed. 37, 17 Am. Bankr. Rep. 272.

[201] Phelan v. Iron Mountain Bank, 4 Dill. 88, 16 N. B. R. 308, Fed. Cas. No. 11,069.

[202] Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530.

[203] Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053; Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866.

[204] Neumann v. Blake, 178 Fed. 916, 102 C. C. A. 294, 24 Am. Bankr. Rep. 575. Property bought by the wife of a bankrupt with money saved by her from sums given her by her husband from time to time for household expenses, when he was not indebted, and for which he asked no accounting, cannot be recovered by his trustee for the benefit of his subsequent creditors, but it is otherwise as to money similarly given to her after he became indebted to such creditors. Milkman v. Arthe, 223 Fed. 507, 139 C. C. A. 55, 34 Am. Bankr. Rep. 536.

creditors or to evade the law.[205] And payment of interest in advance to a bank, to secure a renewal of a note held by it, is not giving a preference.[206] So of the payment of the salary of an officer of the bankrupt corporation, provided the amount does not exceed a fair compensation for his services.[207] And so of the payment of accrued interest on a statutory dower in real estate.[208] So, where a debtor, just before filing his voluntary petition in bankruptcy, went to two of his creditors, whose debts were barred by the statute of limitations, and paid each of them one dollar, and did this for the purpose of taking their claims out of the statute, so that they might share with the other creditors in the impending bankruptcy, and they had no knowledge or cause to believe that he meant to give them any advantage other than the revival of their debts, it was held that no preference was created.[209] And where gold dust is deposited in a bank to the credit of the depositor (who afterwards becomes bankrupt), and its value is at once ascertained and the amount entered on the books to his credit, there is no preference given, though the same sum is offset by the bank against an indebtedness to it of the depositor, because the total value of his estate available for creditors is not diminished.[210] But a debt due to a railroad company for freight is not in any way privileged, and to pay it may constitute a preference, if under circumstances which would produce that result in the case of any other creditor.[211] And a payment by insolvent makers to the holder of a note, for the purpose of relieving an indorser, is a preference forbidden by the bankruptcy law.[212]

It is of course unnecessary, to constitute a preference, that the creditor should have been paid in full. The giving and acceptance of a partial payment may be equally within the statute. But a payment by an insolvent debtor of a percentage on claims of a part of his creditors, which does not lessen the percentage which his other creditors will receive, is not a preference nor forbidden by the bankruptcy law.[213]

[205] In re Locke, 1 Low. 293, 2 N. B. R. 382, Fed. Cas. No. 8,439. But where an insolvent debtor, having a leasehold interest in a bakery where he carries on his business, pays the rent due on the same, as a means of enabling himself to continue the business, but with the purpose of defrauding his creditors, by hoarding and secreting the proceeds of the business so continued, and incurring new business debts without paying any old ones, the payment of the rent should be considered as a fraudulent preference under the bankruptcy law. In re Lange, 97 Fed. 107.

[206] In re Kellar, 110 Fed. 348, 6 Am. Bankr. Rep. 621.

[207] Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530.

[208] In re Riddle's Sons, 122 Fed. 559, 10 Am. Bankr. Rep. 204.

[209] In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270.

[210] American Bank of Alaska v. Johnson, 245 Fed. 312, 157 C. C. A. 504, 40 Am. Bankr. Rep. 502.

[211] Farrin v. Crawford, 2 N. B. R. 602, Fed. Cas. No. 4,686.

[212] Landry v. Andrews, 22 R. I. 597, 48 Atl. 1036; Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895.

[213] In re Hapgood, 2 Low. 200, Fed. Cas. No. 6,044.

Payment of a debt by the bankrupt after the filing of the petition in bankruptcy against him is unauthorized, and ordinarily the trustee is entitled to recover the amount paid; but if the debt was one wholly or in part enforceable as against the trustee, it is a proper exercise of discretion for the court to deny such recovery, either in whole or pro tanto.[214]

If the payment was made in total or partial discharge of a valid existing lien on property of the bankrupt, which would not have been disturbed by the bankruptcy proceedings, it cannot be considered a preference, because the assets available for general creditors are not thereby diminished. This has been ruled where the creditor merely held an inchoate lien,[215] and much more where the obligation is in the form of a valid mortgage.[216] But a mortgage or deed of trust never delivered as a subsisting obligation cannot excuse a payment by the mortgagor on the indebtedness covered thereby, which payment otherwise would be invalid as a preference.[217] And a creditor holding security for less than the amount of his claim cannot, if he knows the debtor to be insolvent, obtain a valid preferential payment of the unsecured part of his debt within four months before the adjudication in bankruptcy.[218]

Where insurance was effected on mortgaged property, and the proceeds thereof having been collected, a portion thereof was surrendered to the mortgagor, who had become bankrupt, that it might be repaid to the mortgagee in liquidation of an unsecured debt, it was held that the amount so relinquished at once became the property of the mortgagor, and when repaid constituted a preference.[219]

§ 588. **Payment or Transfer by Third Person.**—A payment received by a creditor of a bankrupt from a third person, which does not come out of the assets of the bankrupt, does not constitute a preference.[220] Thus, where, after the bankrupt had made an assignment for the benefit of his creditors, and just before bankruptcy proceedings were instituted against him, a firm of which he was a member paid an entire claim against him on which the firm was at most only partially liable, it was held that this payment did not constitute a preference.[221] So, payments

[214] Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118, 30 Am. Bankr. Rep. 79.

[215] In re Lynn Camp Coal Co., 168 Fed. 998, 22 Am. Bankr. Rep. 60.

[216] Stewart v. Hopkins, 30 Ohio St. 502. But compare Shutts v. First Nat. Bank, 98 Fed. 705, 3 Am. Bankr. Rep. 492.

[217] Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496.

[218] Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144.

[219] Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411, 33 Am. Bankr. Rep. 484.

[220] Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; Mason v. National Herkimer County Bank, 172 Fed. 529, 97 C. C. A. 155, 22 Am. Bankr. Rep. 733; McKay v. Sperry Flour Co., 95 Wash. 209, 163 Pac. 377.

[221] In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495. And see Nestor v.

made by the wife of the bankrupt out of her separate estate in settlement of claims against him, though made within four months before his bankruptcy, are not preferential.[222] And where directors of a corporation borrow money, which is used by the corporation, and thereafter, when the corporation is insolvent, pay the debt with money which they borrow by giving their individual notes, secured by mortgage on their own property, there is no preference given by the corporation.[223] But where an insolvent trader conveys his stock to certain persons who are sureties on his note given to a bank, and the sureties, in consideration of the transfer, agree to pay the debt to the bank, the bank not participating in this arrangement, and not being paid by the sureties out of the proceeds of the property, there is a preference as to the sureties, but not as to the bank.[224] Payment is made by the bankrupt, within the meaning of the provisions of the Act relating to illegal preferences, when it is made under his authority or by his direction by his debtor to his creditor.[225] And in a case where the seller of property was originally entitled to the benefit of insurance placed on the property by the buyer, but this agreement had been superseded by the giving of a chattel mortgage, and afterwards the buyer became insolvent, it was held that a payment of the insurance money to the seller constituted a preference.[226]

§ 589. **Payments to Attorneys For Past or Future Services.**—The bankruptcy act provides that "if a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." [227] It is therefore not unlawful for a person who expects to file his voluntary petition in bankruptcy, or expects that creditors will petition against him, to retain an attorney for the purpose of such proceedings, and to pay him in advance a reasonable fee for his services, or transfer property to him in compensation for such services or give him security for the payment of his fee.[228] This

Joseph (C. C. A.) 265 Fed. 246, 46 Am. Bankr. Rep. 5.

[222] Goode v. Elwood Lodge, 160 Ind. 251, 66 N. E. 742.

[223] Keegan v. Hamilton Nat. Bank, 163 Ind. 216, 71 N. E. 647.

[224] Horstman v. Little, 99 Tex. 530, 90 S. W. 1095.

[225] De Forest v. Crane & Ordway Co., 55 Mont. 489, 179 Pac. 291. And see Turnbull v. Potlatch Lumber Co. (Sup.) 181 N. Y. Supp. 56.

[226] Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415.

[227] Bankruptcy Act 1898, § 60d. This does not apply to fees paid to an attorney by assignees under a general assignment made by the bankrupt prior to the bankruptcy proceedings. In re Geller (D. C.) 216 Fed. 558.

[228] In re Cummins, 196 Fed. 224, 28

does not constitute the giving of a preference, under the statute, to such attorney,[229] and the transaction will be valid as against the subsequent proceedings in bankruptcy, unless there was a fraudulent purpose to place assets out of the reach of the creditors,[230] or unless some party in interest objects to it and petitions to have the transaction examined by the court, in which case the question of the reasonableness of the fee paid is to be determined and the excess, if any, refunded.[231] But this part of the statute refers only to services rendered to the bankrupt prior to the commencement of the proceedings in bankruptcy.[232] Another section of the statute provides for the payment (as a priority claim) of "one reasonable attorney's fee, for services actually rendered ——— to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow."[233] But both of these provisions of the act refer only to such professional services as are rendered in aid of the bankruptcy proceedings and for the benefit of the creditors, or in the administration and distribution of the bankrupt's estate;[234] and they will not validate a transfer of an insolvent's property to an attorney in consideration of an agreement to negotiate with the creditors of the insolvent for a settlement of his difficulties without resort to the bankruptcy court, nor a payment or transfer of property for services to be performed in defending the bankrupt against anticipated criminal proceedings, which are not brought until after the filing of the petition in bankruptcy.[235] And although, in a case coming within the provisions of the statute, a transfer of property may be equally allowable as a payment of money, yet an agreement that the attorney shall take certain goods in payment for his services, where there is no actual delivery or change of possession, does not constitute a "transfer" of the property, and if the attorney takes possession of the goods after the adjudication, and therefore after they have

Am. Bankr. Rep. 385; Triplett v. Hanley, 1 Dill. 217, Fed. Cas. No. 14,179; Williams v. Pultze, 5 Ohio Dec. 503; Lyon v. Marshall, 11 Barb. (N. Y.) 241; Furth v. Stahl, 205 Pa. St. 439, 55 Atl. 29. Compare In re Evans, 3 N. B. R. 261, Fed. Cas. No. 4,552.

[229] Swartz v. Frank, 183 Mo. 438, 82 S. W. 60.

[230] Goodrich v. Wilson, 119 Mass. 429, 14 N. B. R. 555.

[231] In re Morris, 125 Fed. 841, 11 Am. Bankr. Rep. 145; In re Porter, 253 Fed. 552, 165 C. C. A. 222.

[232] Pratt v. Bothe, 130 Fed. 670, 65 C. C. A. 48, 12 Am. Bankr. Rep. 529.

[233] Bankruptcy Act 1898, § 64b, 3.

[234] A debtor's contract, made three days after a fire, with an attorney to collect the insurance, where the insurers questioned their liability, was a proceeding in the usual course of business, having no necessary relation to bankruptcy; and such contract could not of itself justify the conclusion that it was made "in contemplation of the filing of a petition" in bankruptcy, within the meaning of the Act, although a petition in bankruptcy was actually filed against the debtor five days after the payment to the attorney. Tripp v. Mitschrich, 211 Fed. 424, 128 C. C. A. 96, 31 Am. Bankr. Rep. 662.

[235] In re Habegger, 139 Fed. 623, 71 C. C. A. 607, 3 Ann. Cas. 276, 15 Am. Bankr. Rep. 198.

passed ino the custody of the law, he must restore them.[236] As to a payment for legal services rendered in the past, and not relating to the bankruptcy proceedings, it stands on the same footing as a payment to any other creditor, and will be preferential in the same circumstances or under the same conditions,[237] unless the attorney has a lien on a particular fund or an agreement which amounts to an equitable assignment of it.[238]

§ 590. Set-Off or Adjustment of Mutual Accounts.—The bankruptcy law does not prevent parties from adjusting their mutual accounts or exercising a right of set-off which would belong to them even after the institution of bankruptcy proceedings.[239] Thus, the application by a bank of the amount standing to the credit of a depositor in his general account, subject to check, on a note of the depositor or other indebtedness to the bank, does not constitute a voidable preference, though made while the depositor was insolvent and within four months prior to his bankruptcy.[240] But this rule does not apply if the bank knew or had reasonable cause to believe that a preference was intended to be giv-

[236] In re Corbett (D. C.) 104 Fed. 872, 5 Am. Bankr. Rep. 224.

[237] Magee v. Fox, 229 Fed. 395, 143 C. C. A. 515, 36 Am. Bankr. Rep. 161; In re George W. Shiebler & Co. (D. C.) 163 Fed. 545, 20 Am. Bankr. Rep. 777.

[238] In re Coney Island Lumber Co. (D. C.) 199 Fed. 803, 34 Am. Bankr. Rep. 563; Van Slyke v. Huntington (C. C. A.) 265 Fed. 86, 45 Am. Bankr. Rep. 173.

[239] See Gleason v. Bush, 100 Misc. Rep. 608, 166 N. Y. Supp. 321; Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969.

[240] Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, 30 Am. Bankr. Rep. 624; Studley v. Boylston Nat. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, 30 Am. Bankr. Rep. 161; New York County Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42; In re Cross (C. C. A.) 273 Fed. 39, 46 Am. Bankr. Rep. 727; In re Cross (D. C.) 265 Fed. 769, 45 Am. Bankr. Rep. 695; In re Looschen Piano Case Co. (D. C.) 259 Fed. 931, 43 Am. Bankr. Rep. 733; American Bank of Alaska v. Johnson, 245 Fed. 312, 157 C. C. A. 504, 40 Am. Bankr. Rep. 502; Fourth Nat. Bank of Wichita v. Smith, 240 Fed. 19, 153 C. C. A. 55, 38 Am. Bankr. Rep. 771; American Bank & Trust Co. v. Coppard, 227 Fed. 597, 142 C. C. A. 229, 35 Am. Bankr. Rep. 742; In re Radley Steel Const. Co. (D. C.) 212 Fed. 462; Johnson v. American Bank, 5 Alaska, 145; Chicago Title & Trust Co. v. Federal Trust & Sav. Bank, 192 Fed. 967; In re Wright-Dana Hardware Co., 207 Fed. 636; Tomlinson v. Bank of Lexington, 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221; In re Scherzer, 130 Fed. 631, 12 Am. Bankr. Rep. 451; Robinson v. Wisconsin, M. & F. Ins. Co. Bank, 9 Biss. 117, 18 N. B. R. 243, Fed. Cas. No. 11,969; Habegger v. First Nat. Bank, 94 Minn. 445, 103 N. W. 216, 110 Am. St. Rep. 379; Cox v. First Nat. Bank, 126 La. 88, 52 South. 227; Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306; West v. Bank of Lahoma, 16 Okl. 328, 85 Pac. 469; Conner v. First Nat. Bank (Wash.) 194 Pac. 562; Parker v. First Nat. Bank, 89 Vt. 69, 94 Atl. 1; Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969; Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120. Contra, In re Kellar, 110 Fed. 348, 6 Am. Bankr. Rep. 621. And see Evans v. National Broadway Bank, 48 Misc. Rep. 248, 96 N. Y. Supp. 789; In re Starkweather & Albert, 206 Fed. 797, 30 Am. Bankr. Rep. 743.

en,[241] or if it appears that there was an intent on the part of the bank to accumulate funds of the bankrupt in its possession for its own ultimate security, or that there was any restriction imposed by it on the bankrupt's withdrawal of such funds, or an appropriation of such funds by the bank towards the payment of its claim,[242] or if the deposit was made for a special purpose and therefore did not create the relation of debtor and creditor, but that of bailor and bailee,[243] or if the claim was assigned with knowledge of insolvency and for the express purpose of being used as a set-off in expected bankruptcy proceedings.[244] And so, where a bank, to which the bankrupt was largely indebted on the day the latter became insolvent, closed its account and credited the balance, including a deposit just made, on the bankrupt's indebtedness to it, such deposit amounted to a payment pro tanto of the loan, and its application an unlawful preference.[245] And where a depositor's debt to the bank exceeds the amount standing to his credit, and he settles by giving the bank a check for the amount of such credit balance and cash for the remainder of the debt, the payment in cash will be a fraudulent preference, though the giving of the check may not.[246] On the same principle it is held that a bank which receives from a clearing house association the proceeds of checks presented for clearing by a member short-

[241] First Nat. Bank of El Centro v. Harper, 254 Fed. 641, 166 C. C. A. 139, 43 Am. Bankr. Rep. 82; In re Fairburn Oil & Fertilizer Co. (D. C.) 240 Fed. 835, 39 Am. Bankr. Rep. 211; Ridge Avenue Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289; In re Warner, 5 N. B. R. 414, Fed. Cas. No. 17,177; Knoll v. Commercial Trust Co., 249 Pa. 197, 94 Atl. 750, L. R. A. 1916A, 683, Ann. Cas. 1916C, 988. Payment by a bankrupt of notes held by a bank on which he was indorser, a few days before the bankruptcy and before their maturity, by a check on his deposit in such bank, is not valid as a set-off, but is a voidable preference. Heyman v. Third Nat. Bank (D. C.) 216 Fed. 685. The payment of the proceeds of checks by a bankrupt directly to a bank, with the intention of extinguishing a pre-existing indebtedness (a note owed to the bank) and without having such proceeds credited to his account, is voidable as a preference. Chisholm v. First Nat. Bank, 206 Ill. App. 493.

[242] In re National Lumber Co., 212 Fed. 928, 129 C. C. A. 448; In re Percy Ford Co. (D. C.) 199 Fed. 334, 28 Am. Bankr. Rep. 919; Johnson v. Gratiot County State Bank, 193 Mich. 452, 160 N. W. 544.

[243] Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co. (C. C. A.) 199 Fed. 704. But see this case on appeal, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, 30 Am. Bankr. Rep. 624.

[244] In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84.

[245] Ernst v. Mechanics' & Metals Nat. Bank (D. C.) 200 Fed. 295.

[246] Hough v. First Nat. Bank, 4 Biss. 349, Fed. Cas. No. 6,721. And see Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505, 41 Am. Bankr. Rep. 286. Where a bank, holding its depositor's demand note, on discovering that his financial condition was unsatisfactory, demanded a check for the amount of the deposit, and on receiving it, canceled the note, and took a new note for the amount due, less the deposit, the transaction was held a payment to the bank and a voidable preference, and not an exercise of the right of set-off. In re Cross (D. C.) 265 Fed. 769, 45 Am. Bankr. Rep. 695.

ly before suspending payment, cannot escape liability to account to the estate in bankruptcy of the defaulting member, where the clearing house, in revising the day's clearings because of such suspension, eliminated and returned the checks which had been debited against the defaulting, member, on the theory that, under the doctrine of rescission and following of trust funds, the bank had the right to appropriate any property of the defaulting member and apply it to the reduction of an advance of currency made on that day, especially where such currency was paid out by such defaulting member over its counter to its customers;[247] nor is the transaction any the less a preference because the clearing house, under its rules, might have called on its other members to pay pro rata the amount of the checks drawn upon the defaulting member, and might have treated the credits in favor of the defaulting member as belonging proportionally to the contributing members, since, even under these rules, a check which was the result of the clearings of the previous day would not be entitled to participation.[248] So also, the trustee in bankruptcy can recover the amount of a check given by the bankrupt in good faith before the adjudication in bankruptcy, but which was deposited in a bank other than the one on which it was drawn, and not presented to the drawee bank until after the adjudication.[249]

§ 591. **Partial Payments on Running Accounts.**—The provisions of the bankruptcy act relating to preferences are not so construed as to require a creditor to surrender partial payments received by him on account in the usual course of business where the transactions covered by the account between the parties, taken together, result in increasing the net indebtedness to the creditor and correspondingly increasing the bankrupt's estate.[250] Thus, payments made on an open account, though within four months of the debtor's adjudication in bankruptcy, which are received in good faith and without the creditor having knowledge of the debtor's insolvency, and which are less in amount than the credit sales made by such creditor to the debtor during that period, do not constitute a preference within the meaning of the bankruptcy law.[251] This

[247] Rector v. Commercial Nat. Bank, 200 U. S. 420, 26 Sup. Ct. 294, 50 L. Ed. 533, 15 Am. Bankr. Rep. 347.

[248] Rector v. City Deposit Bank Co., 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527, 15 Am. Bankr. Rep. 336.

[249] Edison Electric Illuminating Co. v. Tibbetts, 241 Fed. 468, 154 C. C. A. 300, 39 Am. Bankr. Rep. 640.

[250] In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; In re Sagor, 121 Fed. 658, 57 C. C. A. 412, 9 Am. Bankr. Rep. 361; Kimball v. E. A. Rosenham Co., 114 Fed. 85, 52 C. C. A. 33, 7 Am. Bankr. Rep. 718; C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670; Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 436, 34 Am. Bankr. Rep. 510; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364. Compare In re Arndt, 104 Fed. 234, 4 Am. Bankr. Rep. 773.

[251] Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, 9 Am. Bankr. Rep. 773; Yaple v. Dahl-Millikan

rule has been applied in a case involving transactions between a stockbroker (the bankrupt) and a customer. Four months before the adjudication, the broker was indebted to the customer to the extent of $1,550, and afterwards he was employed to purchase and carry stocks on a margin, receiving considerable sums of money from the customer, and paying him considerable, but less, sums as profits on his operations. At the date of the adjudication, the bankrupt owed the customer $6,500. It was held that no injustice would be done in this case by treating the parties simply as debtor and creditor, and as the effect of the whole series of transactions was to increase the net indebtedness to the customer, and presumably to increase the bankrupt's estate, the customer was not in the position of one who had received a voidable preference.[252]

But payments made by an insolvent person to his landlord within four months of his adjudication in bankruptcy, and applied by the landlord, not to rent for the current year, but to rent in arrears, constitute a preference.[253]

§ 592. Time of Giving Preference.—A preference given to a creditor, whether in the form of a payment, transfer of property, or security, is not contrary to the bankruptcy law unless given within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication. If it antedates that period, it is not impeachable in the subsequent bankruptcy of the debtor, nor can the creditor be required to surrender it.[254]

Grocery Co., 193 U. S. 526, 24 Sup. Ct. 552, 48 L. Ed. 776, 11 Am. Bankr. Rep. 596; Jaquith v. Alden, 118 Fed. 270, 55 C. C. A. 364, 9 Am. Bankr. Rep. 165.

[252] In re Topliff, 114 Fed. 323, 8 Am. Bankr. Rep. 141. Compare In re Gaylord, 113 Fed. 131, 7 Am. Bankr. Rep. 577.

[253] In re Louis J. Bergdoll Motor Co. (D. C.) 225 Fed. 87, 35 Am. Bankr. Rep. 32.

[254] Atherton v. Beaman (C. C. A.) 264 Fed. 878, 45 Am. Bankr. Rep. 212; In re Baird (D. C.) 245 Fed. 504, 40 Am. Bankr. Rep. 552; In re Martinez (D. C.) 223 Fed. 433, 35 Am. Bankr. Rep. 166; Hagar v. Watt (D. C.) 232 Fed. 373, 36 Am. Bankr. Rep. 370; Sturdivant Bank v. Schade, 195 Fed. 188, 115 C. C. A. 140, 27 Am. Bankr. Rep. 673; Jackson v. Sedgwick, 189 Fed. 508, 26 Am. Bankr. Rep. 836; In re Arden, 188 Fed. 475, 26 Am. Bankr. Rep. 684; In re Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. Bankr. Rep. 826; Wood v. United States Fidelity & Guaranty Co., 143 Fed. 424, 16 Am. Bankr. Rep. 21; In re Kindt, 101 Fed. 107, 4 Am. Bankr. Rep. 148; In re Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145; In re Wise, 2 Nat. Bankr. News, 151; Maurer v. Frantz, 4 N. B. R. 431; Ashby v. Steere, 2 Woodb. & M. 347, Fed. Cas. No. 576; Pratt v. Christie, 95 App. Div. 282, 88 N. Y. Supp. 585; Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546; Brown v. City Nat. Bank, 72 Misc. Rep. 201, 131 N. Y. Supp. 92; McKay v. Weager, 134 N. Y. Supp. 66; Hurlbutt v. Brown, 72 N. H. 235, 55 Atl. 1046; Aretz v. Kloos, 89 Minn. 432, 95 N. W. 216, 769; Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922; Beatty v. Dudley, 80 Ky. 381; Farmers' Nat. Bank v. Slaton, 180 Ky. 700, 203 S. W. 565; Arbury v. De Niord (Sup.) 152 N. Y. Supp. 763; Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916E, 303. As to the validity of renewals of liens or securities, see Brent v. Simpson, 238 Fed. 285, 151 C. C. A. 301, 38 Am. Bankr. Rep. 813; Stockgrowers' State Bank v. Corker, 220

According to the prevailing opinion, a preference given to a creditor by means of a note or bond with warrant of attorney to confess judgment, is given, not when the note and warrant are executed and delivered, but when the warrant is executed by the entry of a judgment thereon and the levy of an execution on the debtor's property. Hence if judgment is entered on such a warrant within four months before bankruptcy, under circumstances making it fraudulent or preferential, it is not saved by the fact that the warrant may have been given any length of time before.[255] But there are some highly respectable authorities to the contrary.[256] Where the alleged preference consists of the giving of security in the nature of a mortgage, its liability to be avoided in subsequent bankruptcy proceedings may depend upon the date when it was recorded.[257] But aside from this question, it may be stated as a general rule that a mortgage, pledge, or bill of sale of chattels takes effect from the time it is given, rather than from the time when the mortgagee or pledgee takes possession of the goods. Hence if the security was valid when given (at least as between the parties), and was given more than four months before the institution of bankruptcy proceedings against the mortgagor or pledgor, it cannot be assailed as a preference merely because the act of the secured creditor in taking possession occurred within that period, but such act will be considered as relating back to the inception of the lien.[258] Likewise, an agreement to pledge collaterals as security, or to assign a claim against a third person, a particular fund, or the like, may constitute an equitable assignment thereof, and if so, will take effect, so far as regards this provi-

Fed. 614, 136 C. C. A. 222, 34 Am. Bankr. Rep. 392.

[255] In re Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; Hood v. Karner, 8 Phila. (Pa.) 160, 5 N. B. R. 348, Fed. Cas. No. 6,664; Golson v. Niehoff, 2 Biss. 434, 5 N. B. R. 56, Fed. Cas. No. 5,524; In re Lord, 5 N. B. R. 318, Fed. Cas. No. 8,503; Ford v. Keys, Fed. Cas. No. 4,933.

[256] Balfour v. Wheeler, 18 Fed. 893; Field v. Baker, 12 Blatchf. 438, 11 N. B. R. 415, Fed. Cas. No. 4,762; Shimer v. Huber, 14 Phila. (Pa.) 402, 19 N. B. R. 414, Fed. Cas. No. 12,787; Lonergan v. Fenlon, Fed. Cas. No. 8,475.

[257] See infra, § 594. And see In re Cahill (D. C.) 208 Fed. 193, 30 Am. Bankr. Rep. 794.

[258] Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, 14 Am. Bankr. Rep. 74; In re East End Mantel & Tile Co., 202 Fed. 275, 29 Am. Bankr. Rep. 793; First Nat. Bank v. Lanz, 202 Fed. 117, 29 Am. Bankr. Rep. 247; Fisher v. Zollinger, 149 Fed. 54, 79 C. C. A. 76; In re National Valve Co., 140 Fed. 679, 15 Am. Bankr. Rep. 524; In re Rogers & Woodward, 132 Fed. 560, 13 Am. Bankr. Rep. 75; In re Automobile Livery Service Co., 176 Fed. 792, 23 Am. Bankr. Rep. 799; Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899; Woods v. Klein, 223 Pa. St. 256, 72 Atl. 523; Christ v. Zehner, 212 Pa. St. 188, 61 Atl. 822; Farnham v. Friedmeyer, 109 Ill. App. 54; Coggan v. Ward, 215 Mass. 13, 102 N. E. 336; Kettenbach v. Walker, 32 Idaho, 544, 186 Pac. 912. But see In re Ball, 123 Fed. 164, 10 Am. Bankr. Rep. 564; Landis v. McDonald, 88 Mo. App. 335; In re Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254.

sion of the bankruptcy law, from the date of the agreement and not from the time of the actual delivery or formal pledge of the subject-matter.[259] But to constitute an equitable assignment within this rule there must be something more than a mere promise to assign upon a future contingency, something, in fact, sufficient to bind the parties in a court of chancery and to justify the application of the rule that equity will regard that as done which ought to have been done.[260] An agreement to give a mortgage, if definite and certain and relating to specific property, will be held in equity as equivalent to an actual mortgage, and may be sustained in the bankruptcy proceedings though actually executed within the four months period.[261] So also, where the mortgage first offered to the creditor was rejected by him because considered defective in form, a subsequent mortgage accepted and delivered will relate back to the former.[262] And where there was a valid transfer of goods by the bankrupt to a creditor in payment of the debt, sufficient to pass title, more than four months before the bankruptcy, the rights of the creditor will not be affected by the fact that the debtor, within the four months, entertaining a doubt as to the validity of the transaction, attempted to perfect it by filing a claim of exemption with reference to the goods transferred and then executing a bill of sale to the creditor.[263] But a transfer of property by a corporation as security for a past indebtedness, within four months prior to

[259] McDonald v. Daskam, 116 Fed. 276, 63 C. C. A. 554, 8 Am. Bankr. Rep. 543; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251; In re Cotton Manufacturers' Sales Co. (D. C.) 209 Fed. 629; Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531; Wiener v. Union Trust Co. (D. C.) 261 Fed. 709, 44 Am. Bankr. Rep. 610. An agreement made more than four months before bankruptcy, by which a fund was created for the payment of claims against the bankrupt, may create an equitable lien in favor of a claimant, the payment of which within the four months would not operate as a preference. Root Mfg. Co. v. Johnson, 219 Fed. 397, 135 C. C. A. 139, 34 Am. Bankr. Rep. 247.

[260] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; First Nat. Bank v. Yerkes, 238 Fed. 278, 151 C. C. A. 294, 38 Am. Bankr. Rep. 136; Johnston v. Huff, Andrews & Moyler Co., 133 Fed. 704, 66 C. C. A. 534, 13 Am. Bankr. Rep. 287; Long v. Farmers' State Bank, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, 17 Am. Bankr. Rep. 103. A lien on part of the raw materials used in a factory was held not to support an assignment to the holder of all of the accounts or finished products sold, made within four months prior to bankruptcy of the manufacturer. Merchants' Nat. Bank v. Corr, 221 Fed. 419, 137 C. C. A. 217, 34 Am. Bankr. Rep. 527.

[261] Murray v. Beal, 23 Utah, 548, 65 Pac. 726. Compare Lathrop Bank v. Holland, 205 Fed. 143, 123 C. C. A. 375, 30 Am. Bankr. Rep. 62.

[262] In re Montgomery, 12 N. B. R. 321, Fed. Cas. No. 9,732. But mortgages promised and given more than four months before bankruptcy for a present consideration have been held voidable preferences where they were not acknowledged until within the four months. In re Caslon Press, 229 Fed. 133, 143 C. C. A. 409, 36 Am. Bankr. Rep. 127.

[263] In re Ratliffe (D. C.) 177 Fed. 587.

its bankruptcy, when it was insolvent and the creditor had reason to believe it insolvent, is voidable as a preference, even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months period.[264]

Where the alleged preference is a payment in money, the date is fixed by its receipt by the creditor, rather than by any prior promise or agreement to pay. Thus, where the bankrupt gave his note to a creditor, which he afterwards paid, the preference, if any, is in the payment and not in the giving of the note, and must be considered as having been given at the date of such payment.[265] But where a note of the bankrupt, payable at a bank, was presented to the bank for payment on the day of its maturity, and was duly certified, and subsequently paid by the bank, the time of certification is to be taken as the time of payment, in determining whether the payment was preferential.[266] But the fact that accounts assigned by the bankrupt to a creditor as collateral security more than four months before the bankruptcy are collected within the four months period, does not entitle the trustee to recover such collections as preferences.[267] And where a debtor makes an absolute sale of property, under an agreement that the purchase money shall be applied by the vendee in paying the claims of certain creditors of the seller, the time of giving a preference, if any, is the time when the buyer takes possession of the property, and not the time when he pays those creditors.[268] A secret advantage given by a debtor to one creditor in a composition, made several years prior to the debtor's bankruptcy, cannot be reached and avoided as a preference under the present bankruptcy statute.[269]

§ 593. **Same; Time of Filing Petition.**—The four months period within which preferences given by a bankrupt may be declared void is to be determined by computing four calendar months backward from the date of the filing of the petition in bankruptcy, and not by comput-

[264] In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Kansas City Stone & Marble Mfg. Co., 9 N. B. R. 76, Fed. Cas. No. 7,610.

[265] In re Wolf & Levy, 122 Fed. 127, 10 Am. Bankr. Rep. 153.

[266] In re Frazin, 201 Fed. 86, 29 Am. Bankr. Rep. 214.

[267] Lowell v. International Trust Co., 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; In re Bird, 180 Fed. 229, 25 Am. Bankr. Rep. 24. A garnishment lien cannot be tacked to the lien of an execution issued on a judgment against defendant, and levied upon the indebtedness owing the garnishee, so as to make out the four-month period. Marsh v. Wilson Bros., 124 Minn. 254, 144 N. W. 959.

[268] Fitch v. Bank of Grand Rapids, 146 Wis. 439, 131 N. W. 1095.

[269] Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641. But compare In re Chaplin, 115 Fed. 162, 8 Am. Bankr. Rep. 121.

ing the time by days.[270] And either the day on which the transfer or payment was made, or the day on which the petition was filed, must be excluded.[271] Amendments to a petition in involuntary bankruptcy filed by a single creditor or by an insufficient number of creditors, whereby other creditors join in the petition and set out their claims, relate back to the original filing of the petition, and do not advance the date of its filing, with reference to reckoning the prohibited period for preferences, though such joinder of creditors was necessary to make it sufficient.[272] But if the petition originally filed was void, as, for instance, because the creditors joining in it were estopped or disqualified to do so, an intervening petition subsequently filed by duly qualified creditors can draw no support from it, and hence payments made more than four months before the filing of the intervening petition, though within four months before the first petition, are not preferential.[273] A transfer of property made on the same day on which the petition in bankruptcy is filed will constitute an unlawful preference, if the other essentials of a preference are present.[274] But under the former statutes, a payment or other disposition of property by the debtor after the filing of the petition was not regarded as a preference, but was held void as an unlawful meddling with property already constructively in the custody of the law.[275] But this point is covered by the present statute, which makes a preference voidable if given "after the filing of the petition and before the adjudication."[276] And it will be observed that "adjudication," with respect to the time, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed.[277]

§ 594. Same; Time of Recording or Filing Lien.—The bankruptcy act provides that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."[278] Another provision of the statute, relating

[270] Kelly v. Skaggs, 90 Ill. App. 543. And see Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973.

[271] Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; Kelly v. Skaggs, 90 Ill. App. 543; Whitley Grocery Co. v. Roach, 115 Ga. 918, 42 S. E. 282.

[272] First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bankr. Rep. 330; Manning v. Evans, 156 Fed. 106, 19 Am. Bankr. Rep. 217. See Witters v. Sowles, 32 Fed. 758.

[273] Despres v. Galbraith, 213 Fed. 190, 129 C. C. A. 534, 32 Am. Bankr. Rep. 170.

[274] Keller v. Faickney, 42 Tex. Civ. App. 483, 94 S. W. 103; Morse v. Godfrey, 3 Story, 364, Fed. Cas. No. 9,856.

[275] In re Randall, 1 Sawy. 56, Fed. Cas. No. 11,552.

[276] Bankruptcy Act 1898, § 60a.

[277] Bankruptcy Act 1898, § 1, cl. 2.

[278] Bankruptcy Act 1898, § 60a. And see Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210; In

to the four months period after the commission of an act of bankruptcy within which the petition may be filed, declares that if the act of bankruptcy is the giving of a preference, the time shall not expire until four months after the recording or registering thereof "if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment."[279] But these two provisions are entirely independent and do not in any way limit or control each other.[280] Under the former bankruptcy laws it was held that a chattel mortgage given to secure a creditor more than four months before a petition in bankruptcy was filed, but kept off the record until within the four months, was not a fraudulent preference, for the limitation began to run from the time the security was given, and not from the time when creditors might have notice of it.[281] But it will be perceived that this is distinctly changed by the present statute.

There has been some difficulty in determining when the recording or registering of a transfer is "required by law" within the meaning of this provision. Some cases have held that the word "required" has reference to the character of the instrument of transfer required to be recorded by the state law, rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded instrument,[282] and that a state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons is a law by which such recording is "required,"[283] or that a law may "require" a chattel mortgage to be recorded although it does not make an unrecorded mortgage void absolutely and under all circumstances.[284] But there is strong authority in support of the rule that, where the local law is such that failure to file or record a chattel mort-

re Alden (D. C.) 233 Fed. 160, 37 Am. Bankr. Rep. 611.

[279] Bankruptcy Act 1898, § 3b. And see Williams v. German-American Trust Co., 219 Fed. 507, 135 C. C. A. 257, 33 Am. Bankr. Rep. 600; Staples v. Warren, 46 App. D. C. 363.

[280] Little v. Holley-Brooks Hardware Co., 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422. And see Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486; Asbury Park Building & Loan Ass'n v. Shepherd (N. J. Eq.) 50 Atl. 65.

[281] Matthews v. Westphal, 1 McCrary, 446, 48 Fed. 664; Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542. And see Miller v. Shriver, 197 Pa. St. 191, 46 Atl. 926; Babbitt v. Kelly, 96 Mo. App. 529, 70 S. W. 384; National Bank of Fredericksburg v. Conway, 1 Hughes, 37, 14 N. B. R. 175, Fed. Cas. No. 10,037; Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502.

[282] First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662.

[283] Loeser v. Savings Deposit Bank & Trust Co., 148 Fed. 975, 78 C. C. A. 597, 17 Am. Bankr. Rep. 628; Bowler v. First Nat. Bank, 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725.

[284] First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662.

gage or other such instrument does not affect its validity as between the parties or as against general creditors, but only as against creditors having a lien or subsequent purchasers or incumbrancers in good faith, the mortgage is not one which is "required" to be recorded or filed.[285]

This provision of the statute applies ordinarily to such instruments as deeds of conveyance,[286] deeds of trust in the nature of mortgages,[287] chattel mortgages,[288] and bills of sale of chattels.[289] But it does not apply to the lien given by an oral chattel mortgage,[290] nor to a conveyance of real estate absolute on its face but intended as a security, where the local law prohibits such a deed from being reduced to a mortgage except by a defeasance in writing, signed, sealed, and delivered by the grantor at the same time and recorded within sixty days.[291] And where a contract providing for the execution of a trust deed to secure bonds of a corporation given for advances is not recorded, a trust deed executed pursuant to such contract within four months prior to the institution of bankruptcy proceedings cannot take effect by relation as of the date of the contract in order to sustain the same as against unsecured creditors.[292]

The only effect of the provision concerning the recording or registering of a transfer is to carry forward the four months period within which a recordable transfer, which was in fact preferential, might be attacked as voidable, leaving the question whether or not the transfer constituted a voidable preference to be determined according to the conditions and intentions of the parties at the date when it was actually made; and a

[285] Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, 35 Am. Bankr. Rep. 814; Bonner v. First Nat. Bank, 248 Fed. 692, 160 C. C. A. 592, 41 Am. Bankr. Rep. 60; Hoshaw v. Cosgriff, 247 Fed. 22, 159 C. C. A. 240, 40 Am. Bankr. Rep. 694; In re Roberts (D. C.) 227 Fed. 177, 36 Am. Bankr. Rep. 137; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543; In re Boyd, 213 Fed. 774, 130 C. C. A. 288, 32 Am. Bankr. Rep. 548; In re Jacobson & Perrill (D. C.) 200 Fed. 812, 29 Am. Bankr. Rep. 603; Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, 14 Am. Bankr. Rep. 477; In re Hunt, 139 Fed. 283; In re Chadwick (D. C.) 140 Fed. 674, 15 Am. Bankr. Rep. 528; Wooldridge v. Williams, 5 Alaska, 149; Pew v. Price, 251 Mo. 614, 158 S. W. 338. Compare Loeser v. Savings Deposit Bank & Trust Co., 148 Fed. 975, 78 C. C. A. 597, 17 Am. Bankr. Rep. 628. And see First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662; In re Montague, 143 Fed. 428, 16 Am. Bankr. Rep. 18.

[286] Ragan v. Donovan, 189 Fed. 138, 26 Am. Bankr. Rep. 311; In re Cahill, 208 Fed. 193, 30 Am. Bankr. Rep. 794.

[287] Harris v. Exchange Nat. Bank, 4 Dill. 133, 14 N. B. R. 510, Fed. Cas. No. 6,119. And see Marsh v. Leseman, 242 Fed. 484, 155 C. C. A. 260, 40 Am. Bankr. Rep. 97.

[288] In re Mission Fixture & Mantel Co. (D. C.) 180 Fed. 263, 24 Am. Bankr. Rep. 873; First Nat. Bank v. Johnson, 68 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485.

[289] In re Reynolds, 153 Fed. 295, 18 Am. Bankr. Rep. 606. But see Coggan v. Ward, 215 Mass. 13, 102 N. E. 336.

[290] Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942.

[291] English v. Ross, 140 Fed. 630, 15 Am. Bankr. Rep. 370.

[292] Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639.

transfer which was then made for a present consideration, and was therefore not preferential, does not become so because of delay in recording it; in other words, delay in placing the instrument on the record does not warrant the court in treating it as if made as security for an antecedent debt.[293] And it has been decided by a learned court in an able opinion that this rule is not affected by the amendment of 1910, changing the wording of this section of the statute.[294] It may perhaps be conceded that this is true in the case where a present and adequate consideration was given at the time the transfer was made. But in all other cases the amendment explicitly provides that a transfer shall be voidable as preferential if "at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer," the bankrupt shall be insolvent, and if the transfer shall "then" operate as a preference, and the person receiving it shall "then" have reasonable cause to believe that its enforcement will effect a preference.[295]

§ 595. Insolvency of Debtor.—In order that a judgment rendered against a debtor, or a transfer of property or payment of money made by him, should operate as a voidable preference, it is essential that he should have been insolvent, for if solvent he has the right to give voluntary satisfaction to any one or more of his creditors, leaving the others to their legal remedies.[296] But the amendatory act of 1910 so far changes this

[293] Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; Big Four Implement Co. v. Wright, 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223, 31 Am. Bankr. Rep. 125. In re Watson, 201 Fed. 962, 30 Am. Bankr. Rep. 871; Debus v. Yates, 193 Fed. 427, 30 Am. Bankr. Rep. 823; In re Jackson Brick & Tile Co., 189 Fed. 636, 26 Am. Bankr. Rep. 915; In re Sturtevant, 188 Fed. 196, 110 C. C. A. 68, 26 Am. Bankr. Rep. 574; Mattley v. Giesler, 187 Fed. 970, 110 C. C. A. 90, 26 Am. Bankr. Rep. 116; In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444; Seager v. Lamm, 95 Minn. 325, 104 N. W. 1; Bradley, Clark & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Farnham v. Friedmeyer, 109 Ill. App. 54; Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Gray & Dudley Hardware Co. v. Guthrie, 200 Ala. 6, 75 South. 318.

[294] In re Watson, 201 Fed. 962, 30 Am. Bankr. Rep. 871. And see Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; Brigman v. Covington, 219 Fed. 500, 135 C. C. A. 250, 33 Am. Bankr. Rep. 644.

[295] Bankruptcy Act 1898, § 60b, as amended by Act Cong. June 25, 1910, 36 Stat. 838. And see In re T. H. Bunch Commission Co. (D. C.) 225 Fed. 243, 35 Am. Bankr. Rep. 526.

[296] Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90; Stephens v. Union Bank & Trust Co., 250 Fed. 192, 162 C. C. A. 328, 42 Am. Bankr. Rep. 89; In re Kassel, 195 Fed. 492, 115 C. C. A. 402, 28 Am. Bankr. Rep. 233; Coleman v. Decatur Egg Case Co., 186 Fed. 136, 108 C. C. A. 248, 26 Am. Bankr. Rep. 248; In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Wittenberg Veneer & Panel Co., 108 Fed. 593, 6 Am. Bankr. Rep. 271; In re Oregon Bulletin Printing & Publishing Co., 13 N. B. R. 503, Fed. Cas. No. 10,559; Empire State Trust Co. v. William F. Fisher Co., 67 N. J. Eq. 88, 57 Atl. 502; Blyth & Fargo Co. v. Kastor, 17 Wyom. 180, 97 Pac. 921; Northrop v. P. W. Finn Const. Co., 260 Pa. 15, 103 Atl. 544; Keystone Brewing Co. v. Schermer, 241 Pa. 361, 88 Atl. 657.

rule that, in the case of a transfer required by law to be recorded, it is sufficient if the debtor is insolvent either at the time of making the transfer or at the time it is recorded.[297] But it is not necessary in any case that the insolvent condition of the debtor at the time of making the transfer should be perpetuated by the existence of the same debts as compared with the same assets, up to the time the trustee takes action to avoid the conveyance. Continuous insolvency is sufficient, though none of the debts existing at the time of the transfer may remain, if new ones have been contracted in their place.[298] In the case of a partnership, it must be shown that both the firm and the individual partners are insolvent or were insolvent at the time, that is, that the aggregate of the partnership and individual assets is not sufficient to pay the debts.[299]

It is not enough to show that the debtor was financially embarrassed and hard pressed by his creditors. This condition may exist and yet he may be solvent.[300] "Insolvency" must here be understood in the sense given to it by the bankruptcy act itself, that is, "a person shall be deemed insolvent when the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."[301] In making this estimate and comparison, all the property of the debtor which has value must be included, not omitting property exempt under the law of the state, and including property transferred in payment of or as security for a just debt, irrespective of whether or not it constitutes a preference, but not property transferred in fraud

[297] Bankruptcy Act 1898, § 60b, as amended by Act Cong. June 25, 1910, 36 Stat. 838. And see McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320.

[298] O'Neill v. Kilduff, 81 Conn. 116, 70 Atl. 640. But the insolvency of the debtor at the time of giving an alleged preference is not shown by proof of his insolvency a month later. Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120.

[299] Levor v. Seiter, 34 Misc. Rep. 382, 69 N. Y. Supp. 987; Rodolf v. First Nat. Bank, 30 Okl. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204. And see supra, § 114.

[300] In re Farmers' Supply Co., 170 Fed. 502, 22 Am. Bankr. Rep. 460.

[301] Bankruptcy Act 1898, § 1, cl. 15. And see Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531; Empire State Trust Co. v. William F. Fisher Co., 67 N. J. Eq. 88, 57 Atl. 502; Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; In re Chappell, 113 Fed. 545, 7 Am. Bankr. Rep. 608; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; Paper v. Stern, 198 Fed. 642, 117 C. C. A. 346, 28 Am. Bankr. Rep. 592; Hicks Co. v. Moore (C. C. A.) 261 Fed. 773, 44 Am. Bankr. Rep. 384; William Schuette & Co. v. Schwank, 265 Pa. 576, 109 Atl. 531; Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825. Contra, see Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113. The test of insolvency is not merely that the debtor may not be able to pay all his debts in money, if all were presented at the given time, but that all his property at a fair valuation would then be insufficient for the purpose. In re Walker Starter Co., 235 Fed. 285, 148 C. C. A. 645, 37 Am. Bankr. Rep. 122; McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702.

of creditors.[302] Property subject to a mortgage must be included if the mortgage is not shown to be fraudulent as against creditors.[303] And accounts against third persons in favor of the debtor are to be reckoned in if they are not shown in any way to be uncollectible.[304] Where the principal asset consists of a plant or property which loses value if not kept in continuous operation,—such as a hotel, a periodical publication, and some kinds of manufacturing establishments,—the value assigned to it in making the estimate must be what it is worth as a going concern and not what it is worth as dead property after bankruptcy has intervened.[305] On the other hand, in adding up the bankrupt's debts, it is proper to include his liability as guarantor of the debt of a third person, the latter being insolvent, though the guaranty was oral and therefore within the statute of frauds.[306]

The trustee in bankruptcy, assailing a judgment or transfer as preferential, must assume the burden of showing the insolvency of the debtor by satisfactory and sufficient evidence; in the absence of this, the transaction cannot be disturbed.[307] The existence of unsatisfied judgments against the debtor does not necessarily prove his insolvency,[308] though the fact that his paper has gone to protest may do so, in connection with other circumstances.[309] Evidence showing that the debtor was not in possession of ready money with which to meet a particular debt, of which he obtained a renewal, falls short of what is required,[310] and the fact that a corporation, engaged in the performance of a contract which required a considerable expenditure before it was entitled to any

[302] Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800.

[303] Posey v. McManis, 28 Tex. Civ. App. 452, 67 S. W. 792.

[304] Blyth & Fargo Co. v. Kastor, 17 Wyom. 180, 97 Pac. 921.

[305] In re Klein, 197 Fed. 241, J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26; Chicago Title & Trust Co. v. John A. Roebling's Sons Co., 107 Fed. 71, 5 Am. Bankr. Rep. 368. But this rule does not apply unless the debtor was in fact a going concern at the time of the alleged preference. In re Fred D. Jones Co. (C. C. A.) 268 Fed. 818, 46 Am. Bankr. Rep. 396.

[306] Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349. Debts of the bankrupt's partnership on which he is jointly liable, and whose debts, on its dissolution, he had agreed to pay, are properly added to his personal debts, to ascertain his entire indebtedness. Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973.

[307] Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598; In re Clifford, 136 Fed. 475, 14 Am. Bankr. Rep. 281; In re Alexander, 102 Fed. 464, 4 Am. Bankr. Rep. 376; Evans v. National Broadway Bank, 48 Misc. Rep. 248, 96 N. Y. Supp. 789; Kimball v. Dresser, 98 Me. 519, 57 Atl. 787; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837; McAleer v. People's Bank, 202 Ala. 256, 80 South. 94. Insolvency may, and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred. Rosenberg v. Semple, 257 Fed. 72, 168 C. C. A. 284, 43 Am. Bankr. Rep. 671.

[308] Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; Levor v. Seiter, 34 Misc. Rep. 382, 69 N. Y. Supp. 987.

[309] In re Louis, 3 Ben. 153, 2 N. B. R. 449, Fed. Cas. No. 8,527.

[310] In re Chappell (D. C.) 113 Fed. 545, 7 Am. Bankr. Rep. 608.

payments, arranged with a bank for making overdrafts, is no evidence that it was insolvent.[311]

§ 596. **Intention of Debtor.**—Under the bankruptcy acts which preceded the present statute it was always held to be an essential element of a voidable preference that the debtor should have intended the transaction to have that effect, that is, that he should have willed and meant to give the particular creditor an advantage over others or a larger share of his debt than they could obtain. And the act of 1898, before the latest amendment, made it a condition to the voidability of a preferential transfer, not exactly that the debtor should have intended to give a preference, but that the person receiving it or to be benefited by it should have had "reasonable cause to believe that it was intended thereby to give a preference." And a majority of the cases decided before 1910 ruled that there could be no voidable preference under the statute unless there was an actual intention (not merely an assumed or attributed intention) on the part of the debtor to give a preference to the creditor receiving it or to be benefited by it.

But all uncertainty on this point was removed by the amendment of 1910, affecting this section of the bankruptcy law,[312] which (aside from the limitation as to time) only requires that the debtor shall be insolvent, that the transfer shall operate as a preference, and that the creditor shall have reasonable cause to believe that the enforcement of the transfer will effect a preference. Since this amendment, therefore, it is not necessary to prove the existence of the debtor's intent to prefer, or the cause for belief on the creditor's part that a preference was intended, or that the debtor knew of his insolvency, the test being whether the creditor had reasonable cause to believe that the bankrupt was then insolvent, and that, in accepting and retaining the transfer, the creditor would receive a larger percentage of his debt than any other creditor of the same class.[313]

311 McDonald v. Clearwater Shortline Ry. Co. (C. C.) 164 Fed. 1007.

312 Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 60b.

313 Richardson v. Germania Bank (C. C. A.) 263 Fed. 320, 45 Am. Bankr. Rep. 351; In re Jones (D. C.) 259 Fed. 927, 44 Am. Bankr. Rep. 253; In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625; Heyman v. Third Nat. Bank (D. C.) 216 Fed. 685; Covington v. Brigman (D. C.) 210 Fed. 499, 32 Am. Bankr. Rep. 35; In re Herman (D. C.) 207 Fed. 594, 31 Am. Bankr. Rep. 243; In re Harrison Bros. (D. C.) 202 Fed. 243; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Batchelder v. Home Nat. Bank, 218 Mass. 420, 105 N. E. 1052; Rogers v. American Halibut Co., 216 Mass. 227, 103 N. E. 689; Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119; Patterson v. Baker Grocery Co., 73 Or. 433, 144 Pac. 673. Compare Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605, 36 Am. Bankr. Rep. 452; In re Freeman Cotting Coat Co. (D. C.) 212 Fed. 548; Wills v. Venus Silk Glove Mfg. Co., 170 App. Div. 352, 156 N. Y. Supp. 115; People's Bank v. McAleer, 204 Ala. 101, 85 South. 413.

§ 597. Creditor's Knowledge or Reasonable Cause of Belief.—To constitute a voidable preference it is strictly essential that the person receiving it or to be benefited by it, or his agent acting for him in the transaction, should have reasonable cause to believe that a preference will be effected by the enforcement of the judgment, transfer, security, or payment, as the case may be. Failing this, it cannot be recovered from him by the trustee in bankruptcy, nor can he be required to surrender it, notwithstanding that it was given by an insolvent debtor and within four months prior to his bankruptcy, and although it may actually result in the preferred creditor's receiving full satisfaction or a larger proportion of his debt than other creditors receive.[314] But it is im-

[314] Pyle v. Texas Transport & Terminal Co., 238 U. S. 90, 35 Sup. Ct. 667, 59 L. Ed. 1215, 34 Am. Bankr. Rep. 843; Joseph Wild & Co. v. Provident Life & Trust Co., 214 U. S. 292, 29 Sup. Ct. 619, 53 L. Ed. 1003, 22 Am. Bankr. Rep. 109; First Nat. Bank v. Galbraith (C. C. A.) 271 Fed. 687; Frederick v. People's Bank of California, 246 Fed. 84, 158 C. C. A. 310, 40 Am. Bankr. Rep. 746; Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; Chambers v. Continental Trust Co. (D. C.) 235 Fed. 441, 38 Am. Bankr. Rep. 78; In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289; Rosenthal v. Bronx Nat. Bank (D. C.) 222 Fed. 83, 35 Am. Bankr. Rep. 273; Stockgrowers State Bank v. Corker, 220 Fed. 614, 136 C. C. A. 222, 34 Am. Bankr. Rep. 392; Sheppard-Strassheim Co. v. Black, 211 Fed. 643, 128 C. C. A. 147, 33 Am. Bankr. Rep. 574; L. A. Becker Co. v. Gill, 206 Fed. 36, 124 C. C. A. 170, 30 Am. Bankr. Rep. 429; Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325, 31 Am. Bankr. Rep. 225; Reber v. Shulman, 183 Fed. 564, 106 C. C. A. 110, 25 Am. Bankr. Rep 475; Greenhall v. Carnegie Trust Co., 180 Fed. 812, 25 Am. Bankr. Rep. 300; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159; Nelson v. Svea Pub. Co., 178 Fed. 136; In re Kullberg, 176 Fed. 585, 23 Am. Bankr. Rep. 758; In re Evans Lumber Co., 176 Fed. 643, 23 Am. Bankr. Rep. 881; In re Neill-Pinckney-Maxwell Co., 170 Fed. 481, 22 Am. Bankr. Rep. 401; In re Burlage Bros., 169 Fed. 1006, 22 Am. Bankr. Rep. 410; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 919; Irish v. Citizens' Trust Co., 163 Fed. 880, 21 Am. Bankr. Rep. 39; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Maher, 144 Fed. 503, 16 Am. Bankr. Rep. 340; McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638; In re Dundas, 111 Fed. 500, 7 Am. Bankr. Rep. 129; In re Blair, 102 Fed. 987, 4 Am. Bankr. Rep. 220; In re Eggert, 98 Fed. 843, 3 Am. Bankr. Rep. 541; Levor v. Selter, 69 App. Div. 33, 74 N. Y. Supp. 499; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837; Cullinane v. State Bank, 123 Iowa, 340, 98 N. W. 887; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65; Wilson v. Weighle, 69 N. J. Eq. 561, 62 Atl. 458; Galveston Dry Goods Co. v. Frenkel, 39 Tex. Civ. App. 19, 86 S. W. 949; Johnston v. George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153; Lampkin v. People's Nat. Bank, 98 Mo. App. 239, 71 S. W. 715; Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922; Blankenbaker v. Charleston State Bank, 111 Ill. App. 393; North v. Taylor, 61 App. Div. 253, 70 N. Y. Supp. 339; Lewis v. First Nat. Bank, 46 Or. 182, 78 Pac. 990; Townes v. Alexander, 69 S. C. 23, 48 S. E. 214; Gamble v. Elkin, 205 Pa. St. 226, 54 Atl. 782; Johnson v. Anderson, 70 Neb. 233, 97 N. W. 339; Cummings v. Kansas City Wholesale Grocery Co., 123 Mo. App. 9, 99 S. W. 470; Herzberg v. Riddle, 171 Ala. 368, 54 South. 635; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Stuart v. Farmers' Bank, 137 Wis. 66, 117 N. W. 820, 16 Ann. Cas. 821; Brooks v. Bank of Beaver City, 82 Kan. 597, 109 Pac. 409; Maxwell v. Davis Trust Co., 69 W. Va. 276, 71 S. E. 270; Soule v. First Nat. Bank, 26 Idaho, 66, 140 Pac. 1098; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 Pac. 338; Williams v. Davidson, 104 Wash. 315, 176 Pac. 334, 181 Pac. 874; Liberty Trust Co. v. Haggerty (N. J. Ch.) 113 Atl. 596. As respects the issue of the creditor's having reasonable

portant to notice that the statute does not require that the preferred creditor should have any actual knowledge on the subject of the debtor's insolvency or the result of the transaction in giving a preference, nor even that he should have any actual belief on that point. What he really thinks or believes is entirely immaterial. What the law requires is "reasonable cause to believe," and if this exists it is enough, without regard to the actual state of the creditor's mind or opinion.[315] And the "preference" which a transferee must have reasonable cause to believe will be effected is not the preference or advantage over unsecured creditors necessarily obtained by one who acquires a mortgage or other lien on property, but a preference made and accepted to evade the rule for equal distribution to all creditors of the same class.[316]

As a first and essential requisite the creditor must have reasonable cause to believe that the debtor is insolvent. This is necessarily implied in, and must serve as a foundation for, reasonable cause to believe that a preference will result from the transaction. Without this, there can be no cause, within the limits of reason, for the creditor to suppose that he is gaining a preference, and consequently the transaction will not be voidable though it does actually result in a preference.[317] "As no great-

cause to believe that the bankrupt was insolvent at the time of a payment to the creditor, the latter's subsequent knowledge is not material, and it does not matter what the debtor knew. Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120.

[315] Toof v. Martin, 13 Wall. 49, 20 L. Ed. 481; Healy v. Wehrung, 229 Fed. 686, 144 C. C. A. 96, 36 Am. Bankr. Rep. 673; In re The Leader, 190 Fed. 624, 26 Am. Bankr. Rep. 668; In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495; Sundheim v. Ridge Avenue Bank, 138 Fed. 951, 15 Am. Bankr. Rep. 132; In re Eggert (C. C. A.) 102 Fed. 735, 4 Am. Bankr. Rep. 449; Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676; Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Underwood v. Winslow, 231 Mass. 595, 121 N. E. 524; Cauthorn v. Burley State Bank, 26 Idaho, 532, 144 Pac. 1108.

[316] In re Chicago Car Equipment Co., 211 Fed. 638, 128 C. C. A. 142, 31 Am. Bankr. Rep. 617. And see In re Edwards (D. C.) 217 Fed. 102, 33 Am. Bankr. Rep. 530; Shuetz v. Walter Boyt Saddlery Co., 166 Iowa, 523, 147 N. W. 897.

[317] Auffmordt v. Rasin, 102 U. S. 620, 26 L. Ed. 262; Bank of Commerce v. Brown, 249 Fed. 37, 161 C. C. A. 97, 40 Am. Bankr. Rep. 591; American Bank of Alaska v. Johnson, 245 Fed. 312, 157 C. C. A. 504, 40 Am. Bankr. Rep. 502; In re Looschen Piano Case Co. (D. C.) 259 Fed. 931, 43 Am. Bankr. Rep. 733; Rosenthal v. Bronx Nat. Bank, 231 Fed. 691, 145 C. C. A. 577, 36 Am. Bankr. Rep. 888; Egner v. Parshelsky Bros., 258 Fed. 238, 169 C. C. A. 304, 44 Am. Bankr. Rep. 175; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219; In re Gottlieb & Co. (D. C.) 245 Fed. 139, 40 Am. Bankr. Rep. 247; In re Rockaway Soda Water Mfg. Co. (D. C.) 226 Fed. 520, 34 Am. Bankr. Rep. 627; City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47; Kennard v. Behrer (D. C.) 270 Fed. 661, 46 Am. Bankr. Rep. 70; In re Greenberger, 203 Fed. 583, 30 Am. Bankr. Rep. 117; Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531; In re Pfaffinger, 154 Fed. 523, 18 Am. Bankr. Rep. 807; Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re Oliver, 109 Fed. 784, 6 Am. Bankr. Rep. 626; In re Eggert, 98 Fed. 843, 3 Am. Bankr. Rep. 541; Stobaugh v. Mills, 8 N. B. R. 361, Fed. Cas. No. 13,461; Gillenwaters v. Miller, 49 Miss. 150; Pearsall v. Nassau

er percentage could be received under the transaction if the debtor be solvent and all his debts be paid in full, a creditor cannot be said to have reasonable cause to believe the enforcement of the transfer would effect a preference, unless, either at the time the transfer was made or at the time it was recorded, he had reasonable cause to believe that his debtor was then insolvent." [318] As to knowledge of insolvency and the means of acquiring it, it is said that if a creditor knows that a payment to him is made out of a fund which, if the debtor should become bankrupt, would be needed equally by the other creditors, the transaction will constitute a voidable preference, if bankruptcy intervenes within four months.[319] And a managing officer and director of an insolvent corporation will be estopped to plead ignorance of its insolvency when he received a preference.[320] But a banker is entitled to transact business with a customer in the ordinary way, take renewal notes, and receive partial payments, and to assume that the customer is solvent, and is therefore not liable to restore payments when the latter becomes bankrupt.[321] It does not follow that because a creditor knows of the insolvency of a firm, he has any cause to believe in the insolvency of one of the partners who is his individual debtor.[322] But where a creditor of a corporation knows of the insolvency of the corporation, as well as of the insolvency of its controlling stockholders, a note given such creditor by stockholders for the amount of its claim against the corporation constitutes a legal fraud against individual creditors of the stockholders, and is not provable against them individually.[323] Neither the fact that a debtor's accounts are past due, nor the fact of his being financially embarrassed, is suffi-

Nat. Bank, 74 App. Div. 89, 77 N. Y. Supp. 11; Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121; Wright v. Cotten, 140 N. C. 1, 52 S. E. 141; Evans v. Claridge, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Shelton v. First Nat. Bank, 31 Okl. 217, 120 Pac. 959; Chicago Title & Trust Co. v. First Nat. Bank, 174 Ill. App. 339; Scott County Milling Co. v. Powers, 112 Miss. 798, 73 South. 792. See William Schuette & Co. v. Swank, 265 Pa. 576, 109 Atl. 531, holding that, where a contractor who, within four months, became a bankrupt, gave a creditor who had furnished lumber for the construction of certain buildings for a coal company an order on the coal company, which it accepted, the validity of the transaction did not turn upon the creditor's personal belief that the contractor was solvent, but upon his reasonable cause to believe that the enforcement of the transfer would effect a preference, such cause depending upon all the circumstances, and not merely upon the debtor's declaration that he was solvent.

[318] In re Sam Z. Lorch & Co. (D. C.) 199 Fed. 944, 28 Am. Bankr. Rep. 784. The time for determining whether the creditor had cause to believe that a payment operates as a preference is the time of payment, and not the time of distribution. W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 146 C. C. A. 89, 36 Am. Bankr. Rep. 722.

[319] Scheuer v. Katzoff (D. C.) 233 Fed. 473, 37 Am. Bankr. Rep. 476.

[320] Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895.

[321] Grandison v. Robertson (D. C.) 220 Fed. 985, 34 Am. Bankr. Rep. 609.

[322] In re Hull (D. C.) 224 Fed. 796, 34 Am. Bankr. Rep. 447; Jacobs v. Van Sickel (C. C.) 123 Fed. 340, 10 Am. Bankr. Rep. 519.

[323] In re Hawkins (D. C.) 249 Fed. 355, 41 Am. Bankr. Rep. 671.

cient to impeach the good faith of a creditor in taking security, so as to render it voidable as a preference, where there were circumstances which tended to explain such embarrassment upon grounds other than insolvency.[324] But in general it is enough if the creditor had knowledge or information of such facts and circumstances as would be calculated to put a reasonably prudent person on inquiry, and if such inquiry, when followed up, would lead to a knowledge of the debtor's insolvency.[325]

If the creditor knows or has reasonable ground to believe that the debtor is insolvent, then it may be inferred without further proof, that he has also reasonable ground to believe that the enforcement of the judgment or transfer which he takes will effect a preference, such being its natural and inevitable result,[326] at least if the payment, transfer, or security puts him in position to collect the whole amount of his claim. But if the preference alleged consists only in giving to one of the creditors a part of the amount of his claim, then he must have reasonable ground to believe that other creditors will not be able to secure so large a dividend, and even positive knowledge of the debtor's insolvency may not be sufficient to warn him of this. For though the debtor may not be able to pay his debts in full, yet he may be able to pay to all his creditors at least as large a share of their claims as goes to the creditor alleged to have been preferred. And where an offer of compromise is made, creditors are not bound to investigate the debtor's ability to pay the amount offered, and ascertain whether it is his intention to pay it to all creditors alike, but are entitled to believe that the offer is made in good faith and to all the creditors, unless something occurs to put them on inquiry.[327] Thus, where a mercantile company, shortly before its bankruptcy, sent a circular letter to its creditors, in which it stated that its last season's business had not been good and that it was unable to meet its payments; that it was about to make a special sale, to be strongly advertised, for the purpose of paying its bills, and would prorate the receipts from the sale among its creditors; and that it was solvent and hoped to pay in full within thirty days, it was held that creditors receiving such circulars, and

[324] J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26.

[325] People's Bank of Mobile v. McAleer, 204 Ala. 101, 85 South. 413.

[326] In re Lynden Mercantile Co., 156 Fed. 713, 19 Am. Bankr. Rep. 444; Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676; In re Hauck, 17 N. B. R. 158, Fed. Cas. No. 6,219; In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; Johnson v. Cohn, 39 Misc. Rep. 189, 79 N. Y. Supp. 139; Hess v. Theodore Hamm Brewing Co., 108 Minn. 22, 121 N. W. 232; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678. But what the statute requires in this respect is reasonable cause on the part of the creditor to believe that a preference "will" result from the transaction; belief or cause to believe that a preference "may" result is not sufficient. Sumner v. Parr (D. C.) 270 Fed. 675, 46 Am. Bankr. Rep. 648.

[327] Smith v. Hewlett Robin Co., 178 Fed. 271, 101 C. C. A. 576, 24 Am. Bankr. Rep. 153.

a few days thereafter small payments on their claims, were not chargeable with reasonable cause to believe that they were intended as a preference, though the debtor was in fact insolvent and did not distribute the proceeds of the sale pro rata.[328] And a sale by a debtor will not be avoided because the purchaser was aware of the intention of the seller to prefer certain of his creditors by the use of the proceeds of the sale.[329] But where a mortgagee of a bankrupt had reasonable cause to believe that the mortgage would "effect a preference," he had reasonable cause to believe that it would "operate as a preference," these phrases, as used in the bankruptcy act, being synonymous.[330]

§ 598. Same; Grounds of Suspicion or Doubt.—To invalidate a payment, transfer, or security, as a preference, it is not enough that the creditor should entertain doubts concerning the solvency of the debtor or the effect of the transaction as preferential, or that he should have cause to regard the debtor's circumstances or the transaction in hand with suspicion. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the enforcement of his transfer or security will give him a preference over other creditors.[331] "Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor or party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer.

[328] In re Varley & Bauman Clothing Co., 191 Fed. 459, 26 Am. Bankr. Rep. 840. But see Benjamin v. Chandler, 142 Fed. 217, 15 Am. Bankr. Rep. 439.

[329] Van Kleeck v. Miller, 19 N. B. R. 484, Fed. Cas. No. 16,860.

[330] Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531.

[331] Stucky v. Masonic Sav. Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; Grant v. First National Bank, 97 U. S. 80, 24 L. Ed. 971; Richardson v. Germania Bank (C. C. A.) 263 Fed. 320, 45 Am. Bankr. Rep. 351; Cohen v. Tremont Trust Co. (D. C.) 256 Fed. 399, 43 Am. Bankr. Rep. 522; Smith v. Powers (D. C.) 255 Fed. 582, 43 Am. Bankr. Rep. 303; Bank of Commerce v. Brown, 249 Fed. 37, 161 C. C. A. 97, 40 Am. Bankr. Rep. 591; Donohue v. Dykstra (D. C.) 247 Fed. 593, 41 Am. Bankr. Rep. 278; Rosenman v. Coppard, 228 Fed. 114, 142 C. C. A. 520, 35 Am. Bankr. Rep. 786; Nichols v. Elken, 225 Fed. 689, 140 C. C. A. 563, 35 Am. Bankr. Rep. 365; Brookheim v. Greenbaum (D. C.) 225 Fed. 635; Beall v. Bank of Bowden (D. C.) 219 Fed. 316, 34 Am. Bankr. Rep. 186; In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373; First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436; Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55, 24 Am. Bankr. Rep. 316; In re Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696; May v. Le Claire, 18 Fed. 164. Claridge v. Kulmer, 1 Fed. 399; Mackel v. Bartlett, 36 Mont. 7, 91 Pac. 1064; King v. Storer, 75 Me. 62; Farmers' & Mechanics' Bank v. Wilson, 4 Neb. (Unof.) 606, 95 N. W. 609; Suffel v. McCartney Nat. Bank, 127 Wis. 208, 106 N. W. 837, 115 Am. St. Rep. 1004; Sirrine v. Stoner-Marshall Co., 64 S. C. 457, 42 S. E. 432; Gnichtel v. First Nat. Bank (N. J. Eq.) 57 Atl. 508; Stevenson v. Milliken-Tomlinson Co., 99 Me. 320, 59 Atl. 472; Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973; Batchelder v. Home Nat. Bank, 218 Mass. 420, 105 N. E. 1052; Craig v. Sharp (Mo. App.) 219 S. W. 98; Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; Mantz v. Capital City State Bank (Iowa) 181 N. W. 3.

do not make such a preference voidable." [332] For example, knowledge of the mere fact that the debtor is not able to pay the creditor's debt in cash may awaken suspicion as to his solvency, but is not of itself reasonable cause to believe that a preference is intended.[333] And so of the fact that the debtor is offering to sell his business,[334] or that he has called his creditors together for the purpose of making terms with them.[335] General reputation or common talk as to the debtor's solvency is not a safe test of the creditor's good faith.[336] Actual knowledge that the debtor is at the time in failing circumstances may be enough to establish the character of the transfer or security as a preference, if he is adjudged bankrupt within four months thereafter.[337] But not so of knowledge, gained from the debtor's statement, that he had previously been financially embarrassed and hard pressed by his creditors, where he afterwards assured the creditor that he had financed his business and was then "all right." [338]

§ 599. Same; Facts Putting on Inquiry; Duty to Investigate.—Where a creditor, about to receive a payment or security from his debtor, has knowledge or notice of facts which would incite a man of ordinary prudence and business intelligence to inquire as to the debtor's solvency and the probable effect of the transaction as a preference, he is bound to prosecute a reasonably diligent inquiry to ascertain the truth; and if he fails to do so, he is chargeable with knowledge of the facts which such an inquiry would have disclosed; and if such ultimate knowledge would give him reasonable cause to believe that the transaction would result in giving him a preference, within the meaning of the bankruptcy law, then he cannot safely accept the payment, transfer, or security, for if the debtor's bankruptcy follows within four months, the transaction will be voidable at the suit of the trustee.[339] In fact, "reasonable cause to be-

[332] Paper v. Stern, 198 Fed. 642, 117 C. C. A. 346, 28 Am. Bankr. Rep. 592.

[333] Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222.

[334] Taft v. Fourth Nat. Bank, 8 Ohio N. P. 59.

[335] In re Kerr, 2 N. B. R. 388, Fed. Cas. No. 7,728.

[336] Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210.

[337] Peninsula Bank of Williamsburg v. Wolcott, 232 Fed. 68, 146 C. C. A. 260, Ann. Cas. 1918C, 477, 36 Am. Bankr. Rep. 327.

[338] In re Salmon, 249 Fed. 300, 161 C. C. A. 308, 41 Am. Bankr. Rep. 45.

[339] Toof v. Martin, 13 Wall. 49, 20 L. Ed. 481; In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650; Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505, 41 Am. Bankr. Rep. 286; National Bank of Bakersfield v. Moore, 247 Fed. 913, 160 C. C. A. 103, 41 Am. Bankr. Rep. 409; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219; In re Sutherland Co. (D. C.) 245 Fed. 663, 40 Am. Bankr. Rep. 305; McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; In re States Printing Co., 238 Fed. 775, 151 C. C. A. 625, 38 Am. Bankr. Rep. 526; Aronin v. Security Bank of New York, 228 Fed. 888, 143 C. C. A. 286, 36 Am. Bankr. Rep. 17; R. H. Herron Co. v. Moore, 208 Fed. 134, 125 C. C. A. 356, 31 Am. Bankr. Rep. 221; Walters v. Zimmerman (D. C.) 208 Fed. 62, 30 Am. Bankr. Rep. 780; Lowell v. Ashton (D. C.) 272 Fed. 536, 47 Am. Bankr. Rep. 100; Tilt v. Citizens' Trust Co., 191 Fed.

lieve," in the bankruptcy act, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property.[340] Thus, if the creditor knows that the debtor has lost his position because of a defalcation, that his principal indorser is dead, and that his notes are overdue and unpaid, it is sufficient to put him on inquiry,[341] as is also the fact that the creditor holds unpaid protested paper of the bankrupt,[342] or that the debtor, on drawing up the mortgage in question, asked to be allowed to secure other creditors in the same instrument.[343] But mere knowledge that the debtor fails to meet his obligations promptly is not sufficient for this purpose,[344] nor is the fact that there are outstanding and unsatisfied judgments against the debtor,[345] or that he is engaged in a business of a speculative character, and that the creditor does not know of any other property owned by the debtor except his interest in certain contracts.[346] If, however, the creditor knows that the bankrupt has committed forgery, this is a circumstance which would incite a person of ordinary prudence to inquiry as to his condition, and the creditor must be charged with notice of all facts

441, 27 Am. Bankr. Rep. 320; Ragan v. Donovan, 189 Fed. 138, 26 Am. Bankr. Rep. 311; In re Thomas Deutschle & Co., 182 Fed. 435, 25 Am. Bankr. Rep. 348; In re C. J. McDonald & Sons, 178 Fed. 487, 24 Am. Bankr. Rep. 446; Brewster v. Goff Lumber Co., 164 Fed. 124, 21 Am. Bankr. Rep. 106; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Tindal, 155 Fed. 456, 18 Am. Bankr. Rep. 773; English v. Ross, 140 Fed. 630, 15 Am. Bankr. Rep. 370; In re Virginia Hardwood Mfg. Co., 139 Fed. 209, 15 Am. Bankr. Rep. 135; In re Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 560, 76 N. E. 258; Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Whitwell v. Wright, 115 N. Y. Supp. 48; Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Walker v. Tenison Bros. Saddlery Co. (Tex. Civ. App.) 94 S. W. 166; Christopherson v. Oleson, 19 S. Dak. 176, 102 N. W. 685; McAleer v. People's Bank, 202 Ala. 256, 80 South. 94; Chisholm v. First Nat. Bank, 176 Ill. App. 382; Russell's Trustee v. Mayfield Lumber Co., 158 Ky. 219, 164 S. W. 783; Jacobs v. Saperstein, 225 Mass. 300, 114 N. E. 360; Craig v. Sharp (Mo. App.) 219 S. W. 95; Walter v. National Fire Ins. Co., 101 Neb. 639, 164 N. W. 569; First Bank of Maysville v. Alexander, 49 Okl. 418, 153 Pac. 646; Utah Ass'n of Creditmen v. Boyle Furniture Co., 43 Utah, 68, 136 Pac. 572; Slayton v. Drown, 93 Vt. 200, 107 Atl. 307.

[340] Stern v. Paper (D. C.) 183 Fed. 228, 25 Am. Bankr. Rep. 451; Bassett v. Evans, 253 Fed. 532, 165 C. C. A. 202, 42 Am. Bankr. Rep. 587.

[341] Sebring v. Wellington, 63 App. Div. 498, 71 N. Y. Supp. 788.

[342] Swan v. Robinson (C. C.) 5 Fed. 287; Conners v. Bucksport Nat. Bank (D. C.) 214 Fed. 847; Grandison v. National Bank of Commerce (D. C.) 220 Fed. 981, 34 Am. Bankr. Rep. 497.

[343] Lloyd v. Strobridge, 16 N. B. R. 197, Fed. Cas. No. 8,435.

[344] Arkansas Nat. Bank v. Sparks, 83 Ark. 324, 103 S. W. 626; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675. And see Sumner v. Parr (D. C.) 270 Fed. 675, 46 Am. Bankr. Rep. 648.

[345] Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

[346] Curtiss v. Kingman, 159 Fed. 880, 87 C. C. A. 60, 20 Am. Bankr. Rep. 95.

which a reasonably diligent inquiry would have disclosed.[347] This is also the case where the creditor knows not only that the debtor is insolvent but that he has absconded.[348] So, in another case, the debtor was a partner in a firm which was hopelessly insolvent, and a personal creditor of his received from him, in partial payment of notes which were not yet due, merchandise which had been bought entirely on the credit of the firm, as the creditor well knew. Taken in connection with the creditor's otherwise intimate knowledge of the affairs of the firm, this was held such knowledge or notice on his part as to render the payment a voidable preference.[349]

But on the other hand, where a creditor makes adequate inquiry as to his debtor's financial condition, and honestly, though mistakenly, believes that he is solvent, the taking of a security for a debt from him will not constitute a preference.[350] As to the kind of investigation to be conducted by a creditor thus "put on inquiry," his duty is not discharged by inquiries addressed to the debtor alone, at least if any better or more reliable sources of information are open to him.[351] And his intentional avoidance of obvious and reliable sources of information will charge him with the knowledge he could have obtained from them.[352] At the same time, he is not obliged to trace to its ultimate source any information of a suspicious nature which may come to his knowledge,[353] and if the question of the debtor's solvency is so close as to require an inventory and a list of debts to determine it, the failure to use this degree of diligence will not charge the creditor with knowledge.[354] Nor can he be charged with notice of facts which could be learned only from intimate and inaccessible sources, such as the books of the bankrupt, but he is only responsible for such information as could be obtained by open observation and reasonable inquiry.[355] At the same time, if the creditor is permitted to examine the books of the debtor, or does make an independent investigation of his business and affairs, especially through the medium of an expert or accountant, he may claim the benefit of the knowledge so acquired, and if the result is not such as to furnish reasonable ground to believe the debtor insolvent and a preference intended, the creditor will be safe from the attack of the trustee

[347] Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632.

[348] De Forest v. Crane & Ordway Co., 55 Mont. 489, 179 Pac. 291.

[349] Gooch v. Stone, 257 Fed. 631, 168 C. C. A. 581, 44 Am. Bankr. Rep. 86.

[350] In re Gaylord (D. C.) 225 Fed. 234, 35 Am. Bankr. Rep. 544.

[351] McGirr v. Humphreys Grocery Co. (D. C.) 192 Fed. 55, 26 Am. Bankr. Rep. 518; Singer v. Jacobs (C. C.) 11 Fed. 559.

[352] Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191, 17 Am. Bankr. Rep. 447.

[353] Blankenbaker v. Charleston State Bank, 111 Ill. App. 393.

[354] Edwards v. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764.

[355] In re Wolf Co., 164 Fed. 448, 21 Am. Bankr. Rep. 73.

in bankruptcy.[356] So, also, where he inquired about the condition of the debtor corporation, not only from its officers, but also from others who were in position to know, and was assured that it was solvent and that its embarrassment was only temporary.[357] And the rule of constructive notice and diligent inquiry should be applied with due regard to the relative situation of the parties. For instance, it should not be applied with too great severity in the case of a young woman of no business experience whatever dealing with a banker, who was also a relative in whom she had confidence, she being "incapable of comprehending the significance of business facts which would have been more enlightening to men of the business world." [358]

§ 600. Same; Circumstances Constituting Ground for Belief.— What constitutes "reasonable ground to believe" that a debtor is insolvent or intends a preference must depend on the facts and circumstances of each case.[359] And although the general business transactions and condition of the bankrupt, at the time of giving a preference, may not have been sufficient to raise this reasonable ground of belief, yet if the special facts and circumstances passing between the particular parties, and out of which the preference grew, were such as to give a reasonable cause for such belief, the creditor is chargeable with notice.[360] The mere fact that the creditor's claim is past due when a payment is made on it or security given for it, is not alone sufficient to charge him with knowledge that the debtor is insolvent or that a preference will be effected,[361] nor the mere fact that an adjudication in bankruptcy actually follows within four months afterwards,[362] though it is otherwise if the creditor at the time knew that the bankrupt's attorney was then engaged in preparing a petition in bankruptcy.[363] Again, a creditor may know that his debtor is financially embarrassed, and may be insistent in his

[356] Stratton v. Lawson, 27 Wash. 310, 67 Pac. 562; Brown v. Guichard, 37 Misc. Rep. 78, 74 N. Y. Supp. 735; Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 78 C. C. A. 370, 17 Am. Bankr. Rep. 511; In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551; In re Bartlett, 172 Fed. 679, 22 Am. Bankr. Rep. 891.

[357] In re Wolf Co., 164 Fed. 448, 21 Am. Bankr. Rep. 73.

[358] Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355.

[359] Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065.

[360] Alderdice v. State Bank of Virginia, 1 Hughes, 47, 11 N. B. R. 398, Fed. Cas. No. 154. Evidence that the bankrupt had for some considerable time been insolvent, and that a creditor to whom a payment was made within four months of bankruptcy had had a long course of dealings with the bankrupt, was frequently in his place of business, and had opportunity for intimate knowledge of his affairs, will sustain a finding that the creditor knew of the bankrupt's insolvency when the payment was made. Benjamin v. Buell (C. C. A.) 268 Fed. 792, 46 Am. Bankr. Rep. 404.

[361] In re Goodhile, 130 Fed. 471, 12 Am. Bankr. Rep. 374; Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046.

[362] Laundy v. First Nat. Bank, 66 Kan. 759, 71 Pac. 259.

[363] In re Galvin, 2 Nat. Bankr. News, 146.

demands for settlement, and yet he may not have a reasonable cause to believe the debtor insolvent,[364] nor is such reasonable cause to be deduced from the mere fact that the debtor had some time previously compromised with his creditors at forty-five cents on the dollar.[365] But statements by a debtor to the creditor's agent, who was seeking to collect past-due debts for which the debtor had given checks which were dishonored by the banks, that the debtor had not and could not obtain money to pay the debts, that its real estate was mortgaged for all it was worth, and that there were judgments outstanding against it, gave the creditor reasonable cause to believe that the debtor was insolvent, so that he must have known that the enforcement of a chattel mortgage then taken would be a preference.[366] So where a bank, to which the bankrupt transferred accounts the day before the petition in bankruptcy was filed, knew that he had overdrawn his account, and that he had deceived the bank as to securities held by it, and that the transaction was handled for the bankrupt by an attorney, and the bank made haste to enter the transaction on its books and to notify persons concerned that it was the holder by assignment of the transferred accounts, this was held to justify the conclusion that the bank's officers believed the debtor to be insolvent.[367] And the fact that suits are pending against the debtor on claims which he does not dispute, is a very suspicious circumstance, and, if coupled with other facts, may be enough to charge the creditor with notice.[368] And a business man who allows his paper to go to protest, suspends payment, and closes the door of his place of business, proclaims to the world that he is insolvent.[369] So, where the creditor learned that an account which the bankrupt had assigned as security was fictitious, and that his place of business was closed, and that it was rumored that he had absconded, and placed its claim in the hands of its attorney for collection, although it was not due, and the claim was paid shortly before the adjudication in bankruptcy, it was held that the creditor had reasonable cause to believe that a preference was intended by such payment.[370] On the other hand, the mere fact that a creditor demands security for a debt previously unsecured does not show that he has reasonable ground for believing the debtor

[364] Sharpe v. Allender, 170 Fed. 589, 96 C. C. A. 104, 22 Am. Bankr. Rep. 431; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203. But see In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495.

[365] Warren v. Tenth Nat. Bank, 5 Ben. 395, Fed. Cas. No. 17,200.

[366] In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625.

[367] In re Star Spring Bed Co. (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328.

[368] Crittenden v. Barton, 59 App. Div. 555, 69 N. Y. Supp. 559; Empire State Trust Co. v. William F. Fisher Co., 67 N. J. Eq. 88, 57 Atl. 502.

[369] Markson v. Hobson, 2 Dill. 327, Fed. Cas. No. 9,099; Merchants' Nat. Bank v. Cook, 95 U. S. 342, 24 L. Ed. 412.

[370] Pratt v. Columbia Bank, 157 Fed. 137, 18 Am. Bankr. Rep. 406.

to be insolvent,[371] especially where the security also covers a contemporary loan of money,[372] but the case is altered when, in addition to this, it appears that the security given pledges substantially all of the debtor's unexempt property,[373] or the creditor knows that the property would be insufficient to satisfy the other creditors after paying his own debt.[374] Evidence that the creditor was investigating the financial standing of the bankrupt immediately prior to and continuously up to the time when the transfer was executed is admissible on this point,[375] and it may be shown that he knew that the debtor was hard pressed and without credit, and that he himself had been persistently pressing his own claim for several months.[376] And reasonable cause to believe a debtor insolvent may arise from the fact that he conveyed his residence for the benefit of an insistent creditor, stating at the time that it was his only available resource.[377] Circumstances justifying such a belief may also be found in the fact that the debtor settled with creditors by returning goods bought from them,[378] or that a creditor indirectly bought back goods from the debtor and sold them again at a loss,[379] or accepted for part of his claim goods for which he had no use, or which were not of a kind that he dealt in or employed in his business,[380] or that the money to make a payment was obtained by the sale of the debtor's entire stock in trade, especially if such sale was made secretly or under any suspicious conditions.[381] And where it appears that overdrafts were made by a merchant in collusion with a defaulting teller in the bank, for which a deed of preference was given to the bank just before the bankruptcy of the merchant, the deed is voidable, as such facts constitute reasonable cause for the bank to believe that the debtor was insolvent and that a preference was intended.[382]

§ 601. Imputed Knowledge of Agent or Attorney.—A preference will be voidable if reasonable cause to believe that the debtor is insol-

[371] Perry v. Booth, 80 App. Div. 373, 80 N. Y. Supp. 706; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144. But see In re Hickerson, 162 Fed. 345, 20 Am. Bankr. Rep. 682.

[372] Stedman v. Bank of Monroe, 117 Fed. 237, 54 C. C. A. 269, 9 Am. Bankr. Rep. 4.

[373] Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99, 18 Am. Bankr. Rep. 523; Roberts v. Johnson, 151 Fed. 567, 81 C. C. A. 47, 18 Am. Bankr. Rep. 132.

[374] Robinson v. Tuttle, 2 Hask. 76, Fed. Cas. No. 11,968.

[375] Capital Nat. Bank v. Wilkerson, 36 Ind. App. 550, 76 N. E. 258.

[376] Wright v. William Skinner Mfg. Co., 162 Fed. 315, 89 C. C. A. 23, 20 Am. Bankr. Rep. 527.

[377] Brewster v. Goff, 164 Fed. 127, 21 Am. Bankr. Rep. 239.

[378] In re Andrews, 135 Fed. 509, 14 Am. Bankr. Rep. 247.

[379] Hardy v. Gray, 144 Fed. 922, 75 C. C. A. 562, 16 Am. Bankr. Rep. 387.

[380] In re Christopher Bailey & Son, 166 Fed. 982, 21 Am. Bankr. Rep. 911; Fowler State Bank v. White, 198 Fed. 631, 28 Am. Bankr. Rep. 441.

[381] Thomas v. Adelman, 136 Fed. 973, 14 Am. Bankr. Rep. 510. See Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

[382] Alderdice v. State Bank of Virginia, 1 Hughes, 47, 11 N. B. R. 398, Fed. Cas. No. 154.

vent and a preference intended is brought home either to the creditor himself or to "his agent acting therein". If the agent has knowledge of facts which should have induced such a belief, or of facts which should have put him upon inquiry as to the debtor's financial condition,[383] that knowledge is imputed to the principal and the effect is the same as if he himself had taken part in the transaction being in possession of such information,[384] and it is no defense to the trustee's suit to recover the preference that the creditor had no personal knowledge of the debtor's insolvency.[385] And it is immaterial how or when the agent obtained his knowledge, or that he had confidential relations with the bankrupt, or personal interests which prevented him from disclosing his knowledge to his principal.[386] But the agent must be one acting for the creditor "therein," that is, in the particular transaction by which the preference was created, though a general financial agent may answer this description,[387] but not one who was the clerk or agent of the bankrupt at the time the preference was given and who was not employed by the creditor until afterwards.[388] And it is important to observe that knowledge gained by a sub-agent or an agent of an agent is not imputable to the principal of the original agent. Thus, for example, if the holder of a note sends it to a bank for collection, the bank is his agent, and he is to be charged with whatever knowledge the bank possesses.[389] But where a bank, being the holder of a note, and having no correspondent in the town where the maker lives, sends it to its correspondent in the nearest large city for collection, and the latter sends it to the local bank for collection, although the local bank may know facts about the maker which would render the payment of the note to it a preference under the bankruptcy act, that knowledge is not imputable to the creditor, for the col-

[383] In re Nassau, 140 Fed. 912, 14 Am. Bankr. Rep. 828; Constam v. Haley, 206 Fed. 260, 124 C. C. A. 128. In the case last cited, it is said that, where the holder of a note against a bankrupt is charged with an agent's knowledge of facts indicating the bankrupt's insolvency, such notice is not limited to its effect to convert into preferences payments obtained through the activities of the agent, but extends as well to subsequent payments made by the bankrupt direct to the holder.

[384] Sage v. Wynkoop, 16 N. B. R. 363, Fed. Cas. No. 12,215; Mathews v. Riggs, 80 Me. 107, 13 Atl. 48; In re Cramer & Rogers Grocery Co., 252 Fed. 112, 164 C. C. A. 224, 42 Am. Bankr. Rep. 283; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[385] Plummer v. Myers, 137 Fed. 660, 14 Am. Bankr. Rep. 805.

[386] Campbell v. Balcomb, 183 Fed. 766, 106 C. C. A. 474, 25 Am. Bankr. Rep. 538. But naturally, this rule does not apply where the agent is playing false to both debtor and creditor, as where one acting in the transaction as the agent of the creditor was at the same time business manager of the debtor corporation, and was engaged in a scheme to defraud either the creditor or the corporation or both. Scott County Milling Co. v. Powers, 112 Miss. 798, 73 South. 792.

[387] Wright v. Cotten, 140 N. C. 1, 52 S. E. 141.

[388] Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327.

[389] Hooker v. Blount, 44 Tex. Civ. App. 162, 97 S. W. 1083.

lecting bank is not its agent.[390] On the same principle, if the creditor sends his claim to a collection agency, and the agency employs an attorney to collect it, and the latter procures a confession of judgment, knowing the debtor to be insolvent, this does not affect the validity of the preference so far as concerns the creditor, the attorney not being his agent.[391] But an attorney at law employed directly by the creditor to take proceedings for the enforcement of the claim, or to effect a settlement with the debtor, is the creditor's "agent," and his knowledge is imputable to the creditor.[392] And it is immaterial that the attorney, unknown to the creditor employing him, has special and peculiar facilities for acquiring information, as, by being the professional adviser of the debtor also. So long as the disclosure of the knowledge acquired would not involve a breach of professional confidence, the creditor is chargeable with it.[393] In the case of a corporation which is a creditor, the knowledge of any of its principal officers will be imputed to the corporation itself,[394] but not knowledge possessed by an officer who resigned before the giving of the alleged preference, though he is also the principal stockholder of the bankrupt corporation.[395] And conversely, a person will be held to have notice as an individual of what he does as the president of a corporation.[396] It appears that this rule applies also to public or municipal corporations. Thus, it is held that knowledge possessed by a township trustee as to the insolvency of his brother, a defaulting township treasurer, is imputable to the township itself.[397] In the case of a banking corporation, either the president or the cashier may be re-

[390] Balcomb v. Old Nat. Bank, 201 Fed. 679, 29 Am. Bankr. Rep. 329.

[391] Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392.

[392] Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 464; Wight v. Muxlow, 8 Ben. 52, Fed. Cas. No. 17,629; Vogle v. Lathrop, 3 Pittsb. 268, 4 N. B. R. 439, Fed. Cas. No. 16,985; Mayer v. Hermann, 10 Blatchf. 256, Fed. Cas. No. 9,344; Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424.

[393] Brown v. Jefferson County Nat. Bank, 19 Blatchf. 315, 9 Fed. 258; Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505, 41 Am. Bankr. Rep. 286.

[394] Farmers' Bank of Edgefield v. C. D. Carr & Co., 127 Fed. 690, 62 C. C. A. 446, 11 Am. Bankr. Rep. 733; In re W. A. Silvernail Co. (D. C.) 218 Fed. 979, 33 Am. Bankr. Rep. 59; Patterson v. Baker Grocery, Co., 73 Or. 433, 144 Pac. 673. This rule was applied in a case where the treasurer of a corporation, who had supplied practically all of its capital, and who had been led to believe that a claim against the corporation was unfounded, though other corporate officers knew it to be well founded, paid over to himself on his own claims almost all of the corporate assets. It was held that such payment was preferential, since the corporation was charged with the knowledge of all of its officers. In re Boston-West Africa Trading Co. (D. C.) 255 Fed. 924, 43 Am. Bankr. Rep. 382. But where the bankrupt was treasurer of a corporation, the fact that he knew himself to be insolvent at the time he made a payment on his indebtedness to the corporation did not charge it with knowledge of such fact. Arthur v. Harrington (D. C.) 211 Fed. 215, 32 Am. Bankr. Rep. 216.

[395] Benner v. Blumauer-Frank Drug Co. (D. C.) 198 Fed. 362, 28 Am. Bankr. Rep. 798.

[396] Lancaster v. Collins (C. C.) 7 Fed. 338.

[397] Painter v. Napoleon Tp., 190 Fed. 637, 26 Am. Bankr. Rep. 324.

garded as the "agent" of the bank, so that if either has knowledge of circumstances which would furnish reasonable ground to believe that the debtor of the bank was insolvent and that a preference would result from any payment, transfer, or security given to the bank, then the preference so given will be voidable.[398]

§ 602. Solicitation, Coercion, or Threats by Creditor.—Under former bankruptcy statutes, where an "intention" on the part of the debtor to give a preference was essential to its consummation, it was often argued, and sometimes held, that this implied a willingness or disposition on his part to place the preferred creditor in an advantageous position, or the voluntary selection of one or more creditors to be favored above the rest.[399] But this doctrine did not prevail. It was held by the great majority of the decisions that a preference was none the less a preference because it was not yielded voluntarily, but was wrung from the debtor by urgent solicitation, threats of prosecution, fear of exposure and disgrace, or any other form of coercion or pressure.[400] And these decisions will naturally be applicable under the present bankruptcy act, since it makes no reference to the debtor's intention or to any influence brought to bear upon him.

§ 603. Preference of Partnership or Individual Creditors.—The purpose of the bankruptcy act with reference to the joint assets of a bankrupt partnership is that they shall be first applied, in good faith, to the payment of partnership debts, and that the individual property of the several partners shall first be applied in payment of their separate debts; and any scheme or device resorted to by persons contemplating bankruptcy for the purpose of charging partnership assets with individual debts, or vice versa, is in violation of the act and will be frustrated by the court, the law being administered in such a manner as to pre-

[398] Nisbit v. Macon Bank & Trust Co., 12 Fed. 686, 4 Woods, 464; Crooks v. People's Nat. Bank, 72 App. Div. 331, 76 N. Y. Supp. 92, 495; Collett v. Bronx Nat. Bank, 205 Fed. 370, 123 C. C. A. 392.

[399] Ashby v. Steere, 2 Woodb. & M. 347, Fed. Cas. No. 576. This was also once the rule in England. "If such a preference to a particular creditor be not given voluntarily, but from an apprehension of legal process, it is not fraudulent, and cannot afterwards be vacated." 2 Blackst. Comm. 478, note, citing Thompson v. Freeman, 1 Durn. & E. 155.

[400] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Strain v. Gourdin, 2 Woods, 380, 11 N. B. R. 156, Fed. Cas. No. 13,521; Van Kleeck v. Thurber, Fed. Cas. No. 16,861; Campbell v. Traders' Nat. Bank, 2 Biss. 423, 3 N. B. R. 498, Fed. Cas. No. 2,370; In re Amory & Leeds, Fed. Cas. No. 336c; Atkinson v. Farmers' Bank, Crabbe, 529, Fed. Cas. No. 609; Rison v. Knapp, 1 Dill. 186, 4 N. B. R. 349, Fed. Cas. No. 11,861; Foster v. Hackley, 2 N. B. R. 406, Fed. Cas. No. 4,971; Wilson v. Brinkman, 2 N. B. R. 468, Fed. Cas. No. 17,794; Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676.

vent preferences and secure the equitable distribution of the estate.[401] Hence if a creditor of a firm, knowing the firm to be insolvent, takes a mortgage on the individual property of one of the partners, it is an unlawful preference.[402] And the rule is the same if a member of the firm, owing a private debt, gives the firm's note for it, or his own note indorsed by the firm.[403] But on the other hand, a mortgage given by a partner on his individual property to secure his individual debt is not voidable as a preference in the subsequent bankruptcy of the firm,[404] or at least, the creditors of the firm will have no standing to object to it and seek its vacation.[405] And so, a mortgage given by a partnership on its property is not affected by subsequent bankruptcy proceedings against one of the partners alone.[406] But it may be remarked that, in a suit by a trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference, it must be shown that both the firm and the partners individually were insolvent when the payment was made.[407] As to transactions between the partners themselves, it is held that where one partner sells to his co-partner his entire interest in the property of the firm, the transfer cannot be impeached as a preference, since the transferee is not a creditor, and the effect of the transfer is a loss to all the creditors of the firm alike.[408]

Where the bankrupt obtained credit after he became for the second time a sole trader, by buying out his partner, those extending credit, though they acted in ignorance of the dissolution, will not be presumed to have extended credit solely to the firm and to be merely firm creditors, because of their option to hold the withdrawing partner, where such presumption would preclude the trustee in bankruptcy

[401] In re Jones, 100 Fed. 781. And see Johnson v. Hanley-Hoye Co., 188 Fed. 752, 26 Am. Bankr. Rep. 748.

[402] Mayes v. Palmer (C. C. A.) 208 Fed. 97; In re Parker, 6 Sawy. 248, 11 Fed. 397; Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555; Ft. Pitt Coal & Coke Co. v. Diser, 239 Fed. 443, 152 C. C. A. 321, 38 Am. Bankr. Rep. 566. Compare Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58, A partner's individual indorsement of the firm's notes, while the firm is insolvent, will give the payee a voidable preference. In re Frazer (D. C.) 221 Fed. 83, 34 Am. Bankr. Rep. 467.

[403] In re Jones, 100 Fed. 781, 4 Am. Bankr. Rep. 141. But if a note so indorsed is paid by the firm, and the individual partner becomes bankrupt (but not the firm) his creditors cannot object to the payment as a preference, because the payee has not received any of the property of the bankrupt. Catchings v. Chatham Nat. Bank, 180 Fed. 103, 103 C. C. A. 601, 24 Am. Bankr. Rep. 843.

[404] Hewitt v. Northrup, 9 Hun (N. Y.) 543, 16 N. B. R. 27, affirmed 75 N. Y. 506.

[405] In re Lehigh Lumber Co., 101 Fed. 216, 4 Am. Bankr. Rep. 221.

[406] In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384; Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718.

[407] Tumlin v. Bryan, 165 Fed. 166, 21 Am. Bankr. Rep. 319; Worrell v. Whitney, 179 Fed. 1014, 24 Am. Bankr. Rep. 749; Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946. See Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

[408] In re Rudnick, 102 Fed. 750, 4 Am. Bankr. Rep. 531; Barnes v. Vetterlein, 16 Fed. 759.

from recovering as preferential a payment made by the bankrupt to an old individual creditor after dissolution of the firm, on the theory that there were no other creditors of the same class as the one to whom payment was made.[409]

§ 604. **Rights of Preferred Creditor as to Proving Claim.**—The provision of the statute (§ 57g) is that claims of creditors who have received voidable preferences "shall not be allowed unless such creditors shall surrender such preferences." This is not a penal requirement in such sense that it must be construed strictly.[410] And it applies only to transactions which constitute preferences within the meaning of the other provisions of the act, where preferences are defined and declared to be voidable.[411] But as the law stood originally, this clause contained no limitation as to time, and hence the claim of a preferred creditor could not be allowed without a surrender of the preference, though it was given more than four months before the beginning of the bankruptcy proceedings.[412] This, however, was changed by the amendment of 1903. If, therefore, a creditor files proof of his claim and asks its allowance, and it is opposed on the ground of his having received a preference, and this is found to be the fact, allowance of the claim will be refused or withheld until he shall surrender the preference,[413] and the referee has jurisdiction to determine whether or not a preference has been received when the creditor offers to prove his claim as an unsecured debt.[414] Or if the claim has been proved and allowed, and it is afterwards discovered that the creditor had been preferred, the claim may be expunged on motion of the trustee and at the cost of the creditor.[415] The statute is imperative that the preference must be surrendered before the claim can be allowed. A creditor who has received partial satisfaction of his debt, by means of a preference, cannot retain it and prove a claim for the unsatisfied balance. The amount of the preference cannot be treated as a set-off, either to reduce the amount of his claim, or against the dividend to be received thereon, but the amount must be surrendered

[409] Wartell v. Moore (C. C. A.) 261 Fed. 762, 44 Am. Bankr. Rep. 624.

[410] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814.

[411] In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159.

[412] In re Busby, 124 Fed. 469, 10 Am. Bankr. Rep. 650; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332.

[413] In re Flynn & Co., 126 Fed. 422, 11 Am. Bankr. Rep. 318; In re Graff, 117 Fed. 343, 8 Am. Bankr. Rep. 744; In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Hoffman, 2 Nat. Bankr. News. 554; Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Bingham v. Richmond, 6 N. B. R. 127. Fed. Cas. No. 1,415.

[414] In re Keystone Press, 203 Fed. 710. 29 Am. Bankr. Rep. 715.

[415] In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,948; In re Wise, 2 Nat. Bankr. News, 151.

to the trustee.[416] And a creditor having both a claim entitled to priority and a common claim cannot so apply a preferential payment received as to reduce or extinguish the common claim and then prove the priority claim in full.[417]

But if the creditor will surrender his preference, all taint of fraud arising out of it is removed and he is restored to an equality with all other creditors, and may then prove his entire claim as unsecured.[418] In fact, a creditor in this position has his option either to make the surrender and take his place in the ranks of the unsecured creditors, or to retain and rely upon the preference received.[419] In the latter case, he is open to the attack of the trustee, for it is not necessary to the trustee's right of action to avoid an alleged preference that the creditor should have come into the bankruptcy proceedings in any way.[420] But if no proceeding for that purpose is brought, or if the trustee's attack fails, the creditor remains entirely outside of the bankruptcy proceedings, so far as concerns the claim affected by the preference. And even if he comes into the court of bankruptcy to claim a fund which has been paid into court subject to the rights of conflicting claimants, yet if he does not seek to prove his claim as a general creditor, the fund must be paid over to him intact, on his title to it being decided, and without deducting a preference which he had received.[421]

If allowance of the claim is opposed on this ground, it is incumbent upon the trustee to show the actual receipt by the creditor of money, goods, or other property or security which, if retained, will diminish the assets available for general creditors and give the preferred creditor an advantage over the rest.[422] But if the property preferentially transferred was a note of a third person, the creditor must be charged with the face value of it, without regard to the amount he actually realized

[416] In re Chaplin, 115 Fed. 162, 8 Am. Bankr. Rep. 121; In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Colton Export & Import Co., 115 Fed. 158, 8 Am. Bankr. Rep. 257; In re Keller, 109 Fed. 306, 6 Am. Bankr. Rep. 487; Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641.

[417] In re Henry C. King Co., 113 Fed. 110, 7 Am. Bankr. Rep. 619.

[418] In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Israel, 4 Dill. 501, Fed. Cas. No. 7,112; In re Huntenberg, 153 Fed. 768, 18 Am. Bankr. Rep. 697; In re Nathan, 2 Nat. Bankr. News, 611. The lien of a mortgage given by a bankrupt, which is voidable as a preference, is in effect discharged by the bankruptcy for all purposes. Petition of Rouse, 208 Fed. 881, 126 C. C. A. 90, L. R. A. 1915B, 148, 31 Am. Bankr. Rep. 115.

[419] In re Privett, 132 Fed. 592, 13 Am. Bankr. Rep. 151.

[420] In re Nathan, 2 Nat. Bankr. News, 611.

[421] In re West Norfolk Lumber Co., 112 Fed. 759, 7 Am. Bankr. Rep. 648. A claim by a chattel mortgagee to the proceeds of a sale of the mortgaged property is not such a claim as will be disallowed until the surrender of an illegal preference. In re Johnson (D. C.) 224 Fed. 180.

[422] In re Hickey, 112 Fed. 287, 7 Am. Bankr. Rep. 282; In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221; In re Christensen, 2 Nat. Bankr. News, 695.

on it.[423] But the return of unsalable goods to the unpaid vendor of them, under an agreement that they may be exchanged for new and salable stock, does not constitute the giving of a preference such that he must account for their value before being allowed to prove his claim.[424]

If the bankrupt's estate proves sufficient to pay in full the claims of all unpreferred creditors, and leave a surplus, then a creditor who had received a preference, and had been excluded from participation in the division of the estate in bankruptcy because of his refusal to surrender it, will be entitled, as against the bankrupt, to share in such surplus.[425]

§ 605. Same; Creditor's Knowledge of Intent to Prefer.—As the bankruptcy act of 1898 stood originally, it simply provided that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." (Section 57g.) And it was held that any advantage gained by the creditor which was in the nature of a preference must be surrendered, irrespective of the intention of the debtor in the transaction or the creditor's knowledge of it, and though the preference was given in the usual course of business and innocently received by the creditor. In other words, though the creditor could not be forced to yield up the payment, property, or security received, at the suit of the trustee in bankruptcy, unless it could be shown that he took it with reasonable cause to believe that the debtor was insolvent and that a preference was intended or would result, yet no such knowledge or reasonable cause of belief need be shown as a ground for disallowing his claim when offered for proof. If there was a preference, it must be surrendered, and nothing else was necessary.[426] But this was changed by the amendatory act of 1903, which provides that "the claims of creditors who have received preferences, voidable under section sixty,

[423] In re Chaplin, 115 Fed. 162, 8 Am. Bankr. Rep. 121.

[424] In re Nicholas, 122 Fed. 299, 10 Am. Bankr. Rep. 291.

[425] In re Morton, 118 Fed. 908, 9 Am. Bankr. Rep. 508.

[426] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; Mills v. Lewis, 110 Fed. 512, 49 C. C. A. 131, 6 Am. Bankr. Rep. 612; In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Bashline, 109 Fed. 965, 6 Am. Bankr. Rep. 194; In re Seckler, 106 Fed. 484, 5 Am. Bankr. Rep. 579; In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Alexander, 102 Fed. 464, 4 Am. Bankr. Rep. 376; In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; In re Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; Strobel & Wilken Co. v. Knost, 99 Fed. 409, 3 Am. Bankr. Rep. 631; In re Fort Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Jourdan, 2 Nat. Bankr. News, 581; In re Wise, 2 Nat. Bankr. News, 151; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053.

subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."[427] And it is now held that the claim of a creditor cannot be disallowed or expunged after proof, unless it is shown that the preference would be voidable in a suit by the trustee, that is, it must be shown that the bankrupt was insolvent at the time and that the creditor had reasonable cause to believe that the enforcement of the transfer, payment, or security would effect a preference.[428] But if a given payment received by a creditor without knowledge of insolvency need not be surrendered before proof, not being a preference within the bankruptcy act because the result of the whole transaction was to increase the net indebtedness to the creditor, the same payment, received with knowledge of insolvency, is not a preference and need not be surrendered.[429]

§ 606. Same; What Constitutes "Surrender" of Preference.—There have been many decisions to the effect that a "surrender" of a preference, to entitle the creditor to have his claim allowed, must be voluntary, that is, not forced or compulsory, but following upon the mere demand of the trustee; that if the creditor chose to abide the issue of adversary proceedings against him, the allowance of his claim as well as the retention of the preference must depend upon the result; and that it was too late to make a surrender, within the meaning of the act, after the trustee had begun a suit for the avoidance of the preference, or at any rate after the recovery of a judgment therein.[430] But the Supreme Court of the United States has established a different rule at least in cases where the transaction is not tainted by actual fraud. It has ruled that a

[427] Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 57g.

[428] In re Frazin, 201 Fed. 86, 29 Am. Bankr. Rep. 214; In re Sam Z. Lorch & Co., 199 Fed. 944, 28 Am. Bankr. Rep. 784; Hardy v. Gray, 144 Fed. 922, 75 C. C. A. 562, 16 Am. Bankr. Rep. 387; In re Bloch, 142 Fed. 674, 74 C. C. A. 250, 15 Am. Bankr. Rep. 748; In re Oppenheimer, 140 Fed. 51, 15 Am. Bankr. Rep. 267; In re Pettingill & Co., 135 Fed. 218; In re Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713.

[429] In re Henry C. King Co., 113 Fed. 110, 7 Am. Bankr. Rep. 619.

[430] In re Greth, 112 Fed. 978, 7 Am. Bankr. Rep. 598; In re Owings, 109 Fed. 623, 6 Am. Bankr. Rep. 454; In re Israel, 4 Dill. 501, Fed. Cas. No. 7,112; In re Davidson, 4 Ben. 10, 3 N. B. R. 418, Fed. Cas. No. 3,599; In re Richter's Estate, 1 Dill. 544, 4 N. B. R. 221, Fed. Cas. No. 11,803; In re Tonkin, 4 N. B. R. 52, Fed. Cas. No. 14,094; In re Ayers, 6 Biss. 48, Fed. Cas. No. 685; In re Leland, 7 Ben. 156, 9 N. B. R. 209, Fed. Cas. No. 8,230; In re Montgomery, 3 N. B. R. 374, Fed. Cas. No. 9,728; In re Stephens, 3 Biss. 187, 6 N. B. R. 533, Fed. Cas. No. 13,365; In re Graves, 9 Fed. 816; In re Drummond, 4 Biss. 149, Fed. Cas. No. 4,094; Phelps v. Sterns, 4 N. B. R. 34, Fed. Cas. No. 11,080; In re Scott, 4 N. B. R. 414, Fed. Cas. No. 12,518; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,928; In re Cramer, 13 N. B. R. 225, Fed. Cas. No. 3,345; Burr v. Hopkins, 6 Biss. 345, 12 N. B. R. 211, Fed. Cas. No. 2,192; In re Riorden, 14 N. B. R. 332, Fed. Cas. No. 11,852.

creditor who has in good faith received a preference, which is voidable under the bankruptcy law only because given within four months prior to the filing of the petition, and who has in good faith retained the preference until deprived thereof by the judgment of a court in a suit by the trustee, may still prove the debt so voidably preferred, notwithstanding the statutory provision concerning the "surrender" of preferences.[431]

As to the manner of making the surrender, it naturally depends on the character of the preference given. If it was a payment of money, the sum must be paid over to the trustee in bankruptcy, and an offer by the creditor to allow the amount of the preference to be deducted from any dividend payable to him on his claim is not sufficient.[432] As to reimbursing the estate for the costs of legal proceedings, it may or may not be equitable to require this according to the circumstances of the case.[433] But on the other hand, when a conveyance of land is surrendered as having been preferential, the creditor is entitled to be reimbursed for money expended in paying off incumbrances on the property.[434] Where the property transferred was a note of a third person, the statute is satisfied by a return of the note itself, and the trustee cannot refuse to receive it and demand its face value in cash.[435] But the surrender of a chose in action must be completed by such indorsements or other forms of assignment as may be necessary to pass title.[436] A written waiver of

[431] Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, 13 Am. Bankr. Rep. 552; Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Streeter v. Jefferson County Nat. Bank, 147 U. S. 36, 13 Sup. Ct. 236, 37 L. Ed. 68; State Bank of Clearwater v. Ingram, 237 Fed. 76, 150 C. C. A. 278, 38 Am. Bankr. Rep. 447; In re Louis J. Bergdoll Motor Co., 233 Fed. 410, 147 C. C. A. 346, 37 Am. Bankr. Rep. 501; Union Central Life Ins. Co. v. Drake, 214 Fed. 536, 131 C. C. A. 82, 32 Am. Bankr. Rep. 252; In re Cahill (D. C.) 208 Fed. 193, 30 Am. Bankr. Rep. 794; In re Hamilton Automobile Co., 209 Fed. 596, 126 C. C. A. 418, 31 Am. Bankr. Rep. 205. In re Elletson Co., 193 Fed. 84, 28 Am. Bankr. Rep. 434; In re John A. Baker Notion Co., 180 Fed. 922, 24 Am. Bankr. Rep. 808; In re Clark, 176 Fed. 955, 24 Am. Bankr. Rep. 388; In re Otto F. Lange Co., 170 Fed. 114, 22 Am. Bankr. Rep. 414; In re Baker, 2 Nat. Bankr. News, 195; In re Newcomer, 18 N. B. R. 85, Fed. Cas. No. 10,148; In re Cadwell, 17 Fed. 693; In re Currier, 2 Low. 436, 13 N. B. R. 68, Fed. Cas. No. 3,492.

[432] In re Flick (D. C.) 105 Fed. 503, 5 Am. Bankr. Rep. 465. But where a creditor has received a preference in money which is less than the amount of his claim, the court, instead of requiring the repayment thereof, may properly permit proof of the creditor's claim, and provide by its final decree for the deduction of the amount of the preference, with interest, from the dividend due such creditor. In re Wright-Dana Hardware Co., 212 Fed. 397, 129 C. C. A. 73, 31 Am. Bankr. Rep. 816. And where the trustee in bankruptcy holds money belonging to a creditor who has received a voidable preference, the two sums may be offset and the balance only paid to the trustee as a condition of allowing the creditor's claim. In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289.

[433] In re Moyer (D. C.) 97 Fed. 324.

[434] Crandall v. Coats (D. C.) 133 Fed. 965, 13 Am. Bankr. Rep. 712.

[435] Dickinson v. Security Bank of Richmond, 110 Fed. 353, 49 C. C. A. 84, 6 Am. Bankr. Rep. 551.

[436] Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426.

a lien may be a sufficient surrender of it,[437] but not a mere admission on the part of the creditor that the security given is voidable as having been in fraud of creditors,[438] though it appears that a specific surrender of a mortgage may not be necessary where the lien was cut off by the foreclosure of a prior mortgage before the creditor filed his proof of claim.[439] If the creditor has instituted proceedings in a state court to establish or enforce a lien, they must be abandoned or dismissed as a part of the surrender of his preference.[440]

The surrender of a preference must be made to the trustee in bankruptcy, and not to the bankrupt or to any other person,[441] and pending the appointment and qualification of a trustee, the proof of debt must be postponed, and the preferred creditor cannot vote in the election for trustee.[442] Ordinarily it is intended that the surrender shall be made by the creditor himself. But where the preference consisted in a deed of trust in the nature of a mortgage, it is sufficient if the trustee therein surrenders the property covered.[443] Where the question of preference has been contested, and decided by the referee in bankruptcy adversely to the creditor, the referee should fix a reasonable time within which the creditor may surrender his preference and have his claim allowed.[444] And where the creditor, on demand of the trustee in bankruptcy, has promised and agreed to pay over to him the amount of a preferential payment received by him, which promise he afterwards fulfills, he is not debarred from having his proof of claim allowed by the fact that, for the convenience of counsel, the actual payment of the money was delayed for a few days beyond the close of a year after the adjudication in bankruptcy.[445]

§ 607. Same; Separate or Independent Claims.—According to the preponderance of authority, the provision of the bankruptcy act relating to the surrender of preferences, as a condition to the allowance of claims, is aimed at the preferred creditor, rather than the particular debt sought to be proved; and the sum total of the bankrupt's indebtedness to that creditor at the time the preference was given is affected by it, no matter what may be the nature and number of the items of that indebtedness, so that, although the preference was given in discharge of or as security for

[437] In re Bolinger, 108 Fed. 374, 6 Am. Bankr. Rep. 171.

[438] In re Leeman, 1 Nat. Bankr. News, 331.

[439] In re Stendts, 1 Nat. Bankr. News, 509.

[440] In re Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113; Buckingham v. Schuylkill Plush & Silk Co., 38 Misc. Rep. 305, 77 N. Y. Supp. 857.

[441] In re Bailey, 176 Fed. 990, 24 Am. Bankr. Rep. 201; In re Currier, 2 Low. 436, 13 N. B. R. 68, Fed. Cas. No. 3,492.

[442] In re Parham, 17 N. B. R. 300, Fed. Cas. No. 10,712.

[443] In re Clarke, 2 Hughes, 405, 10 N. B. R. 21, Fed. Cas. No. 2,843.

[444] In re Oppenheimer, 140 Fed. 51, 15 Am. Bankr. Rep. 267.

[445] Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

one particular debt, yet the creditor cannot be allowed to prove a claim upon any other debt, existing at that time, however separate and distinct, unless he will surrender the preference.[446] And a creditor having several claims against the same debtor, who receives a payment on account without special appropriation, under circumstances making it a preference, cannot apply the payment to the extinguishment of some of the claims, and then prove the others as unsecured.[447] And the same principle applies where part of the original indebtedness has been transferred or assigned by the creditor to a third person; no part of it can be allowed as a claim against the estate in bankruptcy until the preference has been surrendered.[448] But this applies only to the state of the accounts between the parties at the time the preference was given. A creditor who has received a preference is not thereby debarred from proving a claim in bankruptcy on a separate and new debt created after the giving of the preference, and to which the preference could have no relation.[449] But where notes given by a debtor to close an account are still held by the creditor and unpaid at the time a further indebtedness on account is contracted, both the notes and the account will constitute the indebtedness then due, and a payment of the notes thereafter, when the debtor is insolvent and within four months prior to his bankruptcy, will con-

[446] In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551; Dunn v. Gans, 129 Fed. 750, 64 C. C. A. 278, 12 Am. Bankr. Rep. 316; In re Delling, 124 Fed. 852, 10 Am. Bankr. Rep. 688; Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39; In re E. O. Thompson's Sons, 121 Fed. 607; In re Lyon, 121 Fed. 723, 58 C. C. A. 143, 10 Am. Bankr. Rep. 25; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; In re Rogers Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Teslow, 104 Fed. 229, 4 Am. Bankr. Rep. 757; In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Beswick, 2 Nat. Bankr. News, 808; In re Myers, 2 Nat. Bankr. News, 765; In re Richter, 1 Dill. 544, 4 N. B. R. 221, Fed. Cas. No. 11,803; In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; In re Barnes, Fed. Cas. No. 1,013; State Nat. Bank v. Monroe Cotton Press Co., 39 La. Ann. 834, 2 South. 605. Contra, In re Hurst, 188 Fed. 707, 26 Am. Bankr. Rep. 781; In re Wise, 2 Nat. Bankr. News, 151; In re Comstock, 3 Sawy. 320, 12 N. B. R. 110, Fed. Cas. No. 3,079; Whiston v. Smith, 2 Low. 101, Fed. Cas. No. 17,523; In re Stephens, 3 Biss. 187, 6 N. B. R. 533, Fed. Cas. No. 13,365; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; Cramton v. Tarbell, Fed. Cas. No. 3,349.

[447] Kimball v. E. A. Rosenham Co., 114 Fed. 85, 52 C. C. A. 33, 7 Am. Bankr. Rep. 718; C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670; Dunn v. Gans, 129 Fed. 750, 64 C. C. A. 278, 12 Am. Bankr. Rep. 316; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411, 33 Am. Bankr. Rep. 484.

[448] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673.

[449] In re Wolf & Levy, 122 Fed. 127, 10 Am. Bankr. Rep. 153; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332; In re Weissner, 115 Fed. 421, 8 Am. Bankr. Rep. 177; In re Jourdan, 2 Nat. Bankr. News, 581; In re Arnold, 2 N. B. R. 160, Fed. Cas. No. 551.

stitute the giving of a preference, which must be surrendered before the account can be proved and allowed.[450]

§ 608. **Proceedings to Recover Preference; Jurisdiction.**—When a creditor who is alleged to have received a preference submits himself to the jurisdiction of the court of bankruptcy, the question of his rights and liabilities may be determined summarily.[451] But the trustee cannot require a creditor in this situation, who has not in any way become a party to the bankruptcy proceedings, to appear before the referee and litigate the question of preference, but he must proceed by plenary suit against the creditor in a proper court.[452] The federal district court has jurisdiction of an action at law for this purpose.[453] And indeed it is expressly provided by statute that "for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."[454] And an action by a trustee against a creditor to recover an alleged preference, begun by summons and complaint, is an action at law within the jurisdiction of the bankruptcy court, notwithstanding an allegation in the complaint of the conversion of the property by the creditor.[455] And the federal court is not prevented from taking jurisdiction by the fact that the alleged preference consisted of a confessed judgment, under which there has been a levy and sale and a distribution of the proceeds to lien creditors.[456] But if the proceeds of a sale remain in the custody of the state court, the proper course for the trustee is to file an intervening petition, asking that such proceeds should be ordered delivered over to him,[457] and in any case the fund, if recovered, must be turned over to the bankruptcy court and administered by it as a part of the bankrupt's estate.[458]

§ 609. **Same; Right of Action.**—Since a trustee in bankruptcy represents the whole body of creditors, and not merely lien claimants or the bankrupt, it is his right and duty to contest the validity of any conveyance, mortgage, payment, or other transfer of property by which one

[450] In re Jones, 123 Fed. 128, 10 Am. Bankr. Rep. 513; In re Meyer, 115 Fed. 997, 8 Am. Bankr. Rep. 598.

[451] In re Black, 2 Ben. 196, 1 N. B. R. 353, Fed. Cas. No. 1,457. And see Giveen v. Smith, 1 Hask. 358, Fed. Cas. No. 5,467.

[452] In re Keystone Press, 203 Fed. 710, 29 Am. Bankr. Rep. 715; In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373.

[453] Kraver v. Abrahams, 203 Fed. 782, 29 Am. Bankr. Rep. 365; Fenlon v. Lonergan, 29 Pa. St. 471; In re Mallory, 1 Sawy. 88, 6 N. B. R. 22, Fed. Cas. No. 8,991.

[454] Bankruptcy Act 1898, § 60b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797, and Act Cong. June 25, 1910, 36 Stat. 838. And see supra, §§ 410, 414.

[455] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[456] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[457] Bear v. Chase (C. C. A.) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

[458] Lovell v. Latham & Co., 186 Fed. 602, 26 Am. Bankr. Rep. 599.

creditor has obtained a preference over others, and he is the only proper party to bring the necessary action;[459] it cannot be brought by another creditor, certainly not by one who has not made himself a party to the bankruptcy proceedings.[460] The proper defendant in such an action is the party receiving the alleged preference or who is to be benefited by it,[461] and it is immaterial that such party is a municipal corporation.[462] Nor is it necessary to the trustee's right of action that the creditor should have actually received money or property. A preference, voidable at the suit of the trustee, is equally given by the creation of a security, or by a release of the debtor's equity or right of redemption,[463] or by a transfer of a claim against a third person, which is credited upon the price of the bankrupt's stock in trade when bought by the preferred creditor.[464] And where the trustee, alleging that a sale by the bankrupt just prior to his adjudication was fraudulent, brings an action against the purchaser for the value of the goods, and receives money in settlement of such claim, he is not thereby precluded from following the money received by the bankrupt for the goods into the hands of preferred creditors.[465] A previous demand for the return or surrender of a preference is not a condition precedent to the trustee's right to sue for its recovery or annulment.[466]

§ 610. Same; Form of Action or Proceeding.—Where a trustee in bankruptcy seeks to recover a preference, but without showing the need of an injunction or discovery or accounting, or of specific performance or the reformation or cancellation of any instrument, but merely asks a decree for the amount of the preference, he has an adequate remedy at law.[467] But if it is necessary to his case that he should avoid a conveyance, transfer, or incumbrance apparently good, or a judgment valid

[459] In re Metzger, 2 N. B. R. 355, Fed. Cas. No. 9,510; Balfour v. Wheeler, 15 Fed. 229. If he sues in a state court, it is of course necessary for the trustee to allege and show his official status, which may be done by the record of the bankruptcy proceedings. Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

[460] Smith v. Brainerd, 37 Minn. 479, 35 N. W. 271.

[461] Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

[462] Painter v. Napoleon Tp., 156 Fed. 289, 19 Am. Bankr. Rep. 412.

[463] Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

[464] Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675.

[465] Lampkin v. People's Nat. Bank, 98 Mo. App. 239, 71 S. W. 715.

[466] Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596, 17 Am. Bankr. Rep. 675; McCulloch v. Davenport Sav. Bank (D. C.) 226 Fed. 309, 35 Am. Bankr. Rep. 765; Boonville Nat. Bank v. Blakey, 166 Ind. 427, 76 N. E. 529; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837; Chicago Title & Trust Co. v. Moody, 233 Ill. 634, 84 N. E. 656; Bowler v. First Nat. Bank, 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725.

[467] Detroit Trust Co. v. Old Nat. Bank, 155 Mich. 61, 118 N. W. 729; Boonville Nat. Bank v. Blakey, 166 Ind. 427, 76 N. E. 529; Allen v. Gray, 201 N. Y. 504, 94 N. E. 652, Ann. Cas. 1912B, 123. Equity has no jurisdiction of a bill by a trustee in bankruptcy to recover

on its face, his proper course is to sue in equity, and it is none the less an equitable action because the ultimate relief sought is a money judgment.[468] And at any rate, a trustee's suit to recover a prohibited preference is analogous to a suit by a judgment creditor to set aside a fraudulent conveyance, and hence its maintenance as a suit in equity is not objectionable on the ground of the existence of an adequate remedy at law.[469] But where a suit in equity is brought by a trustee to avoid an alleged preferential transfer, and to recover a fund to be administered by the bankruptcy court, one claiming a lien on the fund if recovered cannot intervene and enforce such lien by cross-bill, for the rule is that the subject-matter of a cross-bill must be a defense to the original bill, or essentially connected with and necessary to a complete determination of the original suit.[470] Where the action is maintained in the bankruptcy court, it must be a plenary suit, and not a mere summary hearing, unless the defendant will consent; but if he is properly brought into court, it is competent for him to waive an objection of this kind, and in that case the issue may be determined in any appropriate form of proceeding.[471]

§ 611. **Same; Pleading.**—In the trustee's bill or complaint to avoid or recover a preference, it is not necessary to allege facts sufficient to constitute a cause of action to set aside a fraudulent conveyance of real estate, all that is necessary being sufficient allegations of a preference given by an insolvent within four months of the filing of the petition in bankruptcy.[472] The plaintiff must naturally show his own capacity to sue, and this is done by alleging the filing of the petition in bankruptcy, the adjudication of the bankrupt, and the appointment and qualification of the plaintiff as trustee, together with an allegation of demand and re-

an alleged preference, consisting of a payment of money only. First State Bank of Milliken v. Spencer, 219 Fed. 503, 135 C. C. A. 253, 33 Am. Bankr. Rep. 594.

[468] Dyer v. Kratzenstein, 103 App. Div. 404, 92 N. Y. Supp. 1012; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Andrews v. Mather, 134 Ala. 358, 32 South. 738; In re Swenk, 9 Fed. 643. And see supra, § 401.

[469] Pond v. New York Nat. Exch. Bank, 124 Fed. 992, 10 Am. Bankr. Rep. 343; Johnson v. Hanley, 188 Fed. 752, 26 Am. Bankr. Rep. 748; Goodenow v. Milliken, 1 Hask. 348, Fed. Cas. No. 5,535; Houghton v. Stiner, 92 App. Div. 171, 87 N. Y. Supp. 10. Contra, Baden v. Bertenshaw, 68 Kan. 32, 74 Pac. 639; Brock & Spight v. Oliver, 149 Ala. 93, 43 South. 357.

[470] Lovell v. Latham & Co., 186 Fed. 602, 26 Am. Bankr. Rep. 599.

[471] In re Noel, 137 Fed. 694, 14 Am. Bankr. Rep. 715; In re Ulrich, 3 Ben. 355, 3 N. B. R. 133, Fed. Cas. No. 14,327. And see supra, § 403.

[472] Marion State Bank v. Gossett, 175 Ind. 211, 93 N. E. 996; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Benson v. Johnson, 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014; Williams v. German-American Trust Co., 219 Fed. 507, 135 C. C. A. 257, 33 Am. Bankr. Rep. 600; Wilson v. Citizens' Trust Co. (D. C.) 233 Fed. 697, 37 Am. Bankr. Rep. 86. And see Collett v. Adams, 249 U. S. 545, 39 Sup. Ct. 372, 63 L. Ed. 764, 43 Am. Bankr. Rep. 496.

fusal of surrender of the preference.[473] Aside from this, the four essential allegations of the complaint are (1) that the bankrupt was insolvent when the alleged preference was given; (2) that it was within four months prior to the bankruptcy; (3) that the effect of the enforcement of the judgment or transfer will be to enable the defendant to obtain a greater percentage of his debt than any other creditor of the same class; (4) that defendant had reasonable ground to believe that a preference would result from the transaction. The omission of any one of these allegations will render the complaint demurrable.[474] The allegation of the debtor's insolvency must be specific; it is not sufficient to state that he was in failing circumstances and unable to meet his debts in full.[475] And it is necessary to show, explicitly or by necessary allegation, that the payment was made or property transferred out of the estate of the bankrupt.[476] As to the allegation that the preference, if permitted to stand, will enable the defendant to obtain a larger percentage of his claim than other creditors of the same class, this is strictly necessary.[477] To show this, it is probably necessary to insert allegations disclosing the existence of other creditors,—general unsecured creditors who are entitled to participate in the distribution of the estate.[478] And it has been held that the bill is demurrable if it fails to allege that there are not sufficient assets to pay all the creditors who have filed claims against the estate,[479] or that if the complaint alleges that the schedules of the bankrupt show a certain amount of unsecured claims, it must also show the amount of preferred and secured claims.[480] But later and perhaps better considered decisions are to the effect that the trustee need not allege that the assets of the estate are not sufficient to pay the creditors in full,[481] or even that any creditor has filed a claim in the bankruptcy proceeding or any fact showing the necessity for recov-

[473] Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837. But see supra, § 609, as to the necessity of demand before suit.

[474] Painter v. Napoleon Tp., 156 Fed. 289, 19 Am. Bankr. Rep. 412; Ferguson v. Lederer, Strauss & Co., 128 Iowa, 286, 103 N. W. 794.

[475] Martin v. Bigelow, 36 Misc. Rep. 298, 73 N. Y. Supp. 443; McNeel v. Folk, 75 W. Va. 57, 83 S. E. 192.

[476] Richter v. Nimmo, 63 App. Div. 422, 71 N. Y. Supp. 501.

[477] Schreyer v. Citizens' Nat. Bank, 74 App. Div. 478, 77 N. Y. Supp. 494; West v. Bank of Lahoma, 16 Okl. 329, 85 Pac. 469; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

[478] Gering v. Leyda, 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137. It is not necessary to allege the identity of the existing creditors with those who were creditors at the time of the alleged preferential transfer. Minnesota & Ontario Power Co. v. Losey, 260 Fed. 689, 171 C. C. A. 427, 44 Am. Bankr. Rep. 395.

[479] Lesser v. Bradford Realty Co., 47 Misc. Rep. 463, 95 N. Y. Supp. 933.

[480] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[481] Kraver v. Abrahams, 203 Fed. 782, 29 Am. Bankr. Rep. 365; Sherwood v. Holbrook, 98 Misc. Rep. 668, 163 N. Y. Supp. 326.

ering the alleged preference.[482] And the value of the debtor's property and the extent of his indebtedness need not be set out, as these are matters of evidence.[483] It is strictly necessary to aver that the defendant had reasonable cause to believe that the enforcement of the judgment or transfer would result in giving him a preference,[484] but not to state why he had such cause of belief or the evidence of it.[485] It is not sufficient to allege that the transaction in question was fraudulent, or that there was a fraudulent intent on the part of the debtor or of the creditor; this kind of allegation cannot take the place of specific statements of the insolvency of the debtor and of the effect of the transaction as a preference.[486] But on the other hand, if all the elements of a voidable preference are pleaded, no allegation of fraud is needed, as the statute does not require the presence of any other fraud than such as is implied in the particular kind of transactions which it denounces as preferential.[487] In an action at law by a trustee in bankruptcy to recover a preference, the complaint is not demurrable merely because it demands judgment for too large a sum.[488]

§ 612. **Same; Defenses.**—Ignorance of the law is no defense to a creditor who is sued for the recovery of an illegal preference,[489] nor a decree of a land court granting registration of title to the property in question under the conveyance assailed as preferential, at least if the defendant is not a bona fide purchaser taking in reliance on the registered title,[490] nor can the preferred creditor resist the trustee's action on the ground that he has expended money in the custody and care of the property in question, his claim for compensation being one which must be presented for allowance against the estate in bankruptcy.[491] But he may defend on the ground that his taking of the property was merely in pursuance of his rescission of a contract by which he had sold it to the bankrupt,[492] or he may escape liability by repudiating all

[482] Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

[483] Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

[484] Greene v. Montana Brewing Co., 29 Mont. 380, 72 Pac. 751; Johnson v. Anderson, 70 Neb. 233, 97 N. W. 339; Peck v. Connell, 21 Pa. Super. Ct. 22; Hoshaw v. Cosgriff, 247 Fed. 22, 159 C. C. A. 240, 40 Am. Bankr. Rep. 694; Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; Johnson v. American Bank, 5 Alaska, 145.

[485] Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

[486] In re Leech, 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966; Hallack v. Tritch, 17 N. B. R. 293, Fed. Cas. No. 5,956.

[487] **Chism v. Bank of Friars Point** (Miss.) 27 South. 610; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65.

[488] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[489] Martin v. Toof, 1 Dill. 203, 4 N. B. R. 488, Fed. Cas. No. 9,167.

[490] Morris v. Small, 160 Fed. 142, 20 Am. Bankr. Rep. 138.

[491] In re Nechamkus, 155 Fed. 867, 19 Am. Bankr. Rep. 189.

[492] Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921.

claim to the property or its proceeds,[493] or he may show that the payment or transfer was not received from the bankrupt, but from a third person.[494]

§ 613. **Same; Set-Off of Amount of New Credit.**—The bankruptcy act provides that "if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."[495] This, it is held, entitles such a creditor to a deduction of the amount of the new credit from a preference which he is required to surrender before proving his claim, and is not limited in its application to cases where the trustee sues to recover the preference.[496] But there was, at one time, much discussion as to whether the provision quoted applied to preferences received innocently and in good faith and without knowledge of the debtor's insolvency, the current doctrine being that a creditor must surrender even a preference so received, before his claim could be allowed, though it would not be voidable at the suit of the trustee.[497] But the necessity for determining this point no longer exists, since the amendment of 1903 provides that the surrender of preferences before the allowance of claims shall include only such preferences as are subject to be set aside or recovered by the trustee.[498] But it is the intention of the provision relating to set-off that the preference shall have been given in settlement and discharge of an existing debt, and that a new and unconnected transfer of property on credit shall have ensued.[499] Hence where

[493] Giveen v. Smith, 1 Hask. 296, Fed. Cas. No. 5,466.

[494] North v. Taylor, 61 App. Div. 253, 70 N. Y. Supp. 339.

[495] Bankruptcy Act 1898, § 60c.

[496] Kahn v. Cone Export & Commission Co., 115 Fed. 290, 53 C. C. A. 92, 8 Am. Bankr. Rep. 157; Gans v. Ellison, 114 Fed. 734, 52 C. C. A. 366, 8 Am. Bankr. Rep. 153; McKey v. Lee, 105 Fed. 923, 45 C. C. A. 127, 5 Am. Bankr. Rep. 267; Peterson v. Nash Bros., 112 Fed. 311, 50 C. C. A. 260, 55 L. R. A. 344, 7 Am. Bankr. Rep. 181; In re Southern Overalls Mfg. Co., 111 Fed. 518, 6 Am. Bankr. Rep. 633; In re Ryan, 105 Fed. 760, 5 Am. Bankr. Rep. 396; In re Seckler, 106 Fed. 484, 5 Am. Bankr. Rep. 579; In re Soldosky, 111 Fed. 511, 7 Am. Bankr. Rep. 123. Contra, see In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202; In re Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315.

[497] See C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670; In re Oliver, 109 Fed. 784, 6 Am. Bankr. Rep. 626; In re Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713; In re Thompson, 112 Fed. 651, 7 Am. Bankr. Rep. 214; In re Jones, 123 Fed. 128, 10 Am. Bankr. Rep. 513.

[498] Bankruptcy Act 1898, § 57g, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[499] In re John Morrow & Co., 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Bailey, 110 Fed. 928, 7 Am. Bankr. Rep. 26. Deposits in bank by an insolvent custom-

preferential payments have been made on an account for goods sold, and the trustee demands their surrender before the creditor's claim shall be allowed, the latter cannot set off the unpaid balance.[500] Further, it is necessary that the property for which the credit was given should have been acquired by the bankrupt from the preferred creditor himself,[501] but not that it should remain a part of the debtor's estate until his adjudication in bankruptcy, or that it should be used in payment of preferred debts.[502] But the creditor claiming this right of set-off must allege and show all the facts essential to entitle him to it, the same as if he sought to maintain a separate action on his claim.[503]

§ 614. Same; Burden of Proof and Evidence.—In an action to set aside or recover a transfer, incumbrance, or payment, alleged to constitute an unlawful preference, the burden of proof is on the trustee in bankruptcy to establish the existence of each of the statutory elements of a voidable preference.[504] To show the fact that the bankruptcy law has become applicable to the transaction in question, by reason of the debtor's having been adjudged bankrupt as of a certain date, a properly certified copy of the adjudication of bankruptcy is admissible.[505]

er after the bank's cashier had forbidden the payment of checks against the deposit, and very shortly before the filing of a petition in involuntary bankruptcy against the customer, constitute a voidable preference, and cannot be allowed by way of set-off against the customer's debt to the bank. Mechanics' & Metals Nat. Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121, 31 Am. Bankr. Rep. 302. And see Chisholm v. First Nat. Bank, 269 Ill. 110, 109 N. E. 657; In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[500] In re Christensen (D. C.) 101 Fed. 802, 4 Am. Bankr. Rep. 202; Rotan Grocery Co. v. West, 246 Fed. 685, 158 C. C. A. 641, 41 Am. Bankr. Rep. 153; In re Ryan (D. C.) 105 Fed. 760, 5 Am. Bankr. Rep. 396.

[501] Carleton Dry Goods Co. v. Rogers, 120 Fed. 14, 57 C. C. A. 34, 9 Am. Bankr. Rep. 787.

[502] Kaufman v. Tredway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190, 12 Am. Bankr. Rep. 682.

[503] In re Oliver (D. C.) 109 Fed. 784, 6 Am. Bankr. Rep. 626.

[504] Turner v. Schaeffer, 249 Fed. 654, 161 C. C. A. 564, 40 Am. Bankr. Rep. 829; W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 146 C. C. A. 89, 36 Am. Bankr. Rep. 722; Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210; Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325, 31 Am. Bankr. Rep. 225; Northern Neck State Bank v. Smith, 205 Fed. 894, 124 C. C. A. 207, 30 Am. Bankr. Rep. 527; In re Dorr, 196 Fed. 292, 28 Am. Bankr. Rep. 505; Kimmerle v. Farr (C. C. A.) 189 Fed. 295, 26 Am. Bankr. Rep. 818; Brown v. Streicher, 177 Fed. 473, '24 Am. Bankr. Rep. 267; Crane v. Penny, 2 Fed. 187; Parsons v. Topliff, 119 Mass. 245, 14 N. B. R. 547; Burnham v. Ft. Dodge Grocery Co., 144 Iowa, 577, 123 N. W. 220; Getman v. Second Nat. Bank, 89 N. Y. 136; Starbuck v. Gebo, 48 Misc. Rep. 333, 96 N. Y. Supp. 781; Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14; Wickwire v. Webster City Sav. Bank, 153 Iowa, 225, 133 N. W. 100; Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; McDonough v. Cohen, 90 Conn. 469, 97 Atl. 861; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 Pac. 338. It is not incumbent upon the trustee to prove the existence of other creditors or indebtedness in order to defeat a mortgage, made within four months before the bankruptcy, and which operates as a preference. Pierre Banking & Trust Co. v. Winkler, 39 S. D. 454, 165 N. W. 2.

[505] Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098;

And it is proper to show that the defendant's attorney was present when the bankruptcy proceedings were had, as showing notice thereof.[506] But the fact that the particular transaction on which the trustee's suit is based was alleged as an act of bankruptcy in the petition in bankruptcy, and that the adjudication was based on it, is not conclusive proof against the defendant that it constituted an illegal preference, because the issues in the two proceedings are not the same.[507] But on the other hand, a decree of a state court adverse to the creditor, in a suit between the trustee and himself, is a conclusive estoppel upon the creditor if he seeks afterwards to prove his claim in the bankruptcy proceedings.[508]

One thing absolutely essential to constitute a voidable preference is that the debtor should have been insolvent at the time it was given, and the trustee has the burden of proving this fact.[509] The mere fact that the debtor was afterwards adjudged bankrupt raises no presumption that he was insolvent at any given time within four months prior to the filing of the petition.[510] And the giving of a confession of judgment does not of itself raise a presumption of insolvency.[511] But the verified schedules of the bankrupt, containing a presumptively complete list of his assets and liabilities, are admissible in evidence on the question

Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327.

506 Calkins v. Farmers' & Mechanics' Bank, 90 Mo. App. 509, 73 S. W. 1098.

507 Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 78 C. C. A. 370, 17 Am. Bankr. Rep. 511; In re Dunkle, 7 N. B. R. 72, Fed. Cas. No. 4,160. And see supra, § 182.

508 In re Dakin, 19 N. B. R. 181, Fed. Cas. No. 3,539. A judgment of the referee in bankruptcy, disallowing, on objections by the trustee, a claim against the bankrupt's estate, on the ground that the claimant had received a preference, is admissible in evidence in a subsequent suit by the trustee to recover the preference. Ullman, Stern & Krausse v. Coppard, 246 Fed. 124, 158 C. C. A. 350, 40 Am. Bankr. Rep. 426.

509 In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373; In re Arkonia Fabric Mfg. Co., 151 Fed. 914, 18 Am. Bankr. Rep. 470; Edwards v. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764; J. W. Cranor & Co. v. Wade, 26 Okl. 757, 110 Pac. 778; McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; In re Gaylord (D. C.) 225 Fed. 234, 35 Am. Bankr. Rep. 544; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033; Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113. But in an action by the trustee to recover money paid by the bankrupt prior to his adjudication in alleged satisfaction of a debt, where the question at issue is whether any such debt existed in fact, it is not necessary to show that there were unsatisfied creditors at the time the payment was made, or at the time of bringing suit or of the trial. Breckons v. Snyder, 211 Pa. St. 176, 60 Atl. 575.

510 In re Chappell, 113 Fed. 545, 7 Am. Bankr. Rep. 608; Swartz v. Frank, 183 Mo. 438, 82 S. W. 60. But where the undisputed facts established that the bankrupt was insolvent to a large extent at the time of the bankruptcy, even disregarding his contingent obligations, there is prima facie proof that he was insolvent at the time of making the transfer a month before, where there was no going business which substantially affected the situation in so short a time. In re Dix (D. C.) 267 Fed. 1016, 46 Am. Bankr. Rep. 199.

511 In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884.

of his insolvency at the time of the transaction in suit, at least if it occurred not very long before the bankruptcy and without opportunity for any great change in either property or debts.[512] And the bankrupt's books of account are competent evidence on this issue, to which either party may have recourse, and while their showing as to the debtor's solvency or insolvency is not conclusive, yet it is ordinarily important evidence and entitled to much weight.[513] The bankrupt may also be called as a witness in the trustee's suit, and his testimony may be received concerning his financial condition at the date in question; and if the giving of a preference excites a suspicion of collusion between the bankrupt and the preferred creditor, or of a desire on the part of the former to aid and shield the latter, this only goes to the bankrupt's credibility, not his competency.[514] And it is proper and permissible for the trustee in bankruptcy to testify as to the value of the assets of the bankrupt coming into his hands, the amount of debts proved, the amount he realized at a sale at auction of the bankrupt's assets, and other like matters, as all these matters have a tendency to show the bankrupt's solvency or insolvency at the time of the alleged preference, although of course they must be considered in connection with any changes in his financial condition which may be shown to have occurred in the interval.[515] And where the validity of a mortgage is in issue, it is proper to show that, on the day following its execution, the mortgagor made a voluntary conveyance to his son of substantially all his property.[516]

If the intention of the debtor to give a preference is still necessary to justify its avoidance at the suit of the trustee, under the law as it stands at present,[517] the burden of establishing this fact is on the trus-

[512] In re Mandel, 135 Fed. 1021, 68 C. C. A. 546; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Summerville v. Stockton Milling Co., 142 Cal. 530, 76 Pac. 243; Hackney v. Raymond Bros., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800. But see, contra, Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976; Hibbs v. Marpe, 84 Minn. 10, 86 N. W. 612; Batchelder v. Home Nat. Bank, 218 Mass. 420, 105 N. E. 1052; Johnson v. Gratiot County State Bank, 193 Mich. 452, 160 N. W. 544.

[513] Ernst v. Mechanics' & Metals Nat. Bank, 200 Fed. 295; In re Docker Foster Co., 123 Fed. 190, 10 Am. Bankr. Rep. 584; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800; Grandison v. National Bank of Commerce (D. C.) 220 Fed. 981, 34 Am. Bankr. Rep. 497.

[514] Supplee v. Hall, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Otis v. Hadley, 112 Mass. 100.

[515] Ridge Ave. Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 827; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Coolidge v. Ayers, 77 Vt. 448, 61 Atl. 40; In re Star Spring Bed Co. (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328. But see Cullinane v. State Bank, 123 Iowa, 340, 98 N. W. 887.

[516] Supplee v. Hall, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188.

[517] Supra, § 590.

tee.[518] But it may be proved by circumstantial evidence, all the circumstances which go to show the intent being considered,[519] together with the declarations of the bankrupt at and prior to the time of the transaction in question.[520] And failure of the defendant to produce the testimony of the bankrupt or of the creditor alleged to have been preferred, is held to be strongly corroborative of such evidence in the case as tends to show an intent to prefer.[521] But the testimony of the parties to an alleged preferential transaction as to their intention is entitled to but little weight as against proof of the transaction itself.[522] And indeed many of the cases sustain the doctrine that, if the natural and inevitable result of the payment or transfer is to give a preference, the intention of the debtor in that behalf need not be proved but will be conclusively presumed.[523]

The trustee must also assume the burden of proving that the person receiving the alleged preference or to be benefited by it, or his agent acting for him in the transaction had "reasonable cause to believe that the enforcement of the judgment or transfer would effect a preference;" this is absolutely essential and there can be no recovery without it.[524] But the obligation is sufficiently met by showing facts and

[518] Debus v. Yates, 193 Fed. 427, 30 Am. Bankr. Rep. 823; Stevens v. Oscar Holway Co., 156 Fed. 90, 19 Am. Bankr. Rep. 399; Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

[519] Little v. Alexander, 21 Wall. 500, 22 L. Ed. 625; Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Wills v. Venus Silk Glove Mfg. Co., 170 App. Div. 352, 156 N. Y. Supp. 115.

[520] Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286.

[521] Darling v. Townsend, 5 Fed. 176.

[522] Oxford Iron Co. v. Slafter, 13 Blatchf. 455, 14 N. B. R. 380, Fed. Cas. No. 10,637.

[523] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Lazarus v. Eagen (D. C.) 206 Fed. 518, 30 Am. Bankr. Rep. 287; Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27, 26 Am. Bankr. Rep. 818; Brewster v. Goff Lumber Co., 164 Fed. 124, 21 Am. Bankr. Rep. 106; In re McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245; Galveston Dry Goods Co. v. Frenkel (Tex. Civ. App.) 103 S. W. 224; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Ecker v. McAllister, 45 Md. 290; Utah Ass'n of Credit Men v. Boyle Furniture Co., 43 Utah, 523, 136 Pac. 572.

[524] Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Kaufman v. Tredway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190, 12 Am. Bankr. Rep. 682; City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47; Marshall v. Nevins, 242 Fed. 476, 155 C. C. A. 252, 40 Am. Bankr. Rep. 85; Baxter v. Ord, 239 Fed. 503, 152 C. C. A. 381, 39 Am. Bankr. Rep. 273; In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625; Clifford v. Morrill (D. C.) 230 Fed. 190, 36 Am. Bankr. Rep. 805; Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531; Tilt v. Citizens' Trust Co., 191 Fed. 441, 27 Am. Bankr. Rep. 320; Alexander v. Redmond, 180 Fed. 92, 103 C. C. A. 446, 24 Am. Bankr. Rep. 620; In re Houghton Web Co., 185 Fed. 213, 26 Am. Bankr. Rep. 202; Reber v. Louis Shulman & Bro., 179 Fed. 574, 24 Am. Bankr. Rep. 782; Sparks v. Marsh, 177 Fed. 739, 24 Am. Bankr. Rep. 280; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; Getts v. Janesville Wholesale Grocery Co., 163 Fed. 417, 21 Am. Bankr. Rep. 5; Calhoun County Bank v. Cain, 152 Fed. 983, 82 C. C. A. 114, 18 Am. Bankr. Rep. 509; Parker v.

circumstances with respect to the debtor's financial condition such as would put an ordinarily prudent man on inquiry, which would have disclosed the debtor's insolvency and the consequent fact that the transfer would effect a preference.[525] The existence of this reasonable cause of belief may be shown by circumstantial evidence,[526] and indeed the test of the sufficiency of the evidence to warrant the submission of the question to the jury does not rest on the assertions of either party as to his intent or belief, but on inferences which may fairly arise from the facts in evidence.[527] And such cause of belief is not shown by circumstantial evidence, where the circumstances are as consistent with the theory of innocence and good faith on the part of the creditor as with the theory of a fraudulent purpose.[528] But proof that the bankrupt, while insolvent, paid or secured the defendant creditor in full, without making adequate compensation to his other creditors, raises a presumption that the defendant knew that he was being preferred and that the debtor was insolvent, and casts upon him the burden of showing the contrary.[529]

It is likewise necessary, in order to establish a voidable preference, to show that the preferred creditor actually received as a result of the transaction a greater percentage of his debt than that payable to the other creditors.[530] And the burden is on the trustee, if the matter is involved in any doubt, to show that the transaction took place

Black, 151 Fed. 18, 80 C. C. A. 484, 18 Am. Bankr. Rep. 15; Harder v. Clark, 66 Misc. Rep. 584, 123 N. Y. Supp. 1102; Matthews v. Joannes Bros. Co., 156 Mich. 663, 121 N. W. 272; Couturie v. Cresple (Tex. Civ. App.) 134 S. W. 257; Whitwell v. Wright, 115 N. Y. Supp. 48; Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Arkansas Nat. Bank v. Sparks, 83 Ark. 324, 103 S. W. 626; Walker v. Tenison Bros. Saddlery Co. (Tex. Civ. App.) 94 S. W. 166; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Alter v. Clark, 193 Fed. 153; Galbraith v. Whitaker, 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427; Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424; Burnes v. Epstein, 201 Fed. 393; Mantz v. Capital City State Bank (Iowa) 181 N. W. 3; McDonough v. Cohen, 90 Conn. 469, 97 Atl. 861; Soule v. First Nat. Bank, 26 Idaho, 66, 140 Pac. 1098; Continental & Commercial Trust & Savings Bank v. Breen & Kennedy, 188 Ill. App. 467; Craig v. Sharp (Mo. App.) 219 S. W. 98; Brown v. First State Bank (Tex. Civ. App.) 199 S. W. 895; Slayton v. Drown, 93 Vt. 290, 107 Atl. 307. But one claiming to be a purchaser for value and in good faith of property transferred by a preferential conveyance, has the burden of showing the payment of value. Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473.

525 Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837.

526 In re Baker, 14 N. B. R. 433, Fed. Cas. No. 763.

527 Hamilton Nat. Bank v. Balcomb, 177 Fed. 155, 100 C. C. A. 575, 24 Am. Bankr. Rep. 338.

528 Burnham v. Ft. Dodge Grocery Co., 144 Iowa, 577, 123 N. W. 220.

529 Stobaugh v. Mills, 8 N. B. R. 361, Fed. Cas. No. 13,461; Crawford v. Rumpf, 205 Pa. St. 154, 54 Atl. 709.

530 Engel v. Union Square Bank, 182 N. Y. 544, 75 N. E. 1129; Gering v. Leyda, 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137.

within four months prior to the filing of the petition in bankruptcy,[531] that the relation of debtor and creditor then subsisted between the parties, and not a trust relation or other situation which would take the case out of the statute,[532] and that the transaction was not a mere exchange or substitution of securities.[533]

§ 615. Same; Trial.—The rules governing the trial of an action to avoid an illegal preference do not differ materially from those prevailing in an ordinary action or suit. Disputed issues of fact must be submitted to the jury, if there is sufficient evidence to warrant or require it, and not taken from them by binding instructions.[534] Thus, the question whether or not the defendant had "reasonable cause to believe" that a preference would result from the transaction in question or from the enforcement of the security obtained by him is a question of fact, and ordinarily he has the right to have the jury pass upon and decide it.[535] But where the undisputed facts unmistakably show the existence of such reasonable cause of belief, it is not error to direct a verdict,[536] and on the other hand, where there is no evidence in the case from which the jury could draw the conclusion that he had such reasonable cause to believe that a preference would result, binding instructions in favor of the defendant are not improper.[537] The instructions on matters of law, such as the meaning of "insolvency," the nature of a voidable preference, what constitutes reasonable cause to believe a preference was intended, and the like, must be framed with careful regard to the language of the statute and its accepted interpretation.[538] But a

[531] Allen v. Gray, 63 Misc. Rep. 219, 115 N. Y. Supp. 928.

[532] Ferguson v. Bauernfeind, 140 Wis. 42, 121 N. W. 647.

[533] State Bank of Williamson v. Fish, 120 N. Y. Supp. 365.

[534] Clingman v. Miller, 160 Fed. 326, 87 C. C. A. 278, 20 Am. Bankr. Rep. 360; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800; Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

[535] Coleman v. Decatur Egg Case Co., 186 Fed. 136, 108 C. C. A. 248, 26 Am. Bankr. Rep. 248; Wetstein v. Franciscus, 133 Fed. 900, 67 C. C. A. 62, 13 Am. Bankr. Rep. 326; Ridge Ave. Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Brown v. Pelonsky, 210 Mass. 502, 96 N. E. 1102; Hastings v. Fithian, 71 N. J. Law, 311, 60 Atl. 350; Marden v. Sugden, 71 N. H. 274, 52 Atl. 74; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Landis v. McDonald, 88 Mo. App. 335; Harmon v. Walker, 131 Mich. 540, 91 N. W. 1025; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304; Jacobs v. Saperstein, 225 Mass. 300, 114 N. E. 360; McAleer v. People's Bank, 202 Ala. 256, 80 South. 94.

[536] Shale v. Farmers' Bank of Morrill, 82 Kan. 649, 109 Pac. 408; Christopherson v. Oleson, 19 S. D. 176, 102 N. W. 685.

[537] Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14; Waite v. Citizens' State Bank, 178 Iowa, 1331, 160 N. W. 919; Keith v. Simpson, 24 Ga. App. 270, 100 S. E. 649; Brittan v. Buerger Commission Co., 168 Wis. 590, 170 N. W. 947.

[538] Lynch v. Bronson, 80 Conn. 566, 69

charge in regard to the defendant's having "ground to believe" a preference was intended, instead of "cause to believe," in the language of the statute, is not objectionable,[539] and where the trustee's suit proceeds purely on the ground of the defendant's having received an unlawful preference, a request to charge on the elements of a fraudulent conveyance is properly refused.[540]

§ 616. **Same; Measure of Damages or Recovery.**—Where the trustee in bankruptcy succeeds in obtaining judgment for the restoration or avoidance of an unlawful preference, the amount of his recovery or the measure of damages will depend on the nature of the transaction out of which the preference arose. If it was a payment of money, he is entitled to a judgment for an equal amount.[541] If it consisted of a transfer of personal property, he is entitled to a return of the specific property if it still remains in the creditor's hands.[542] But where he left the disposition of securities transferred by the bankrupt to a bank to the absolute discretion of the bank, the proceeds if sold to stand in the place of the securities, the trustee, entitled to avoid the transfer as a preference under the bankruptcy act, is only entitled to a return of the securities and an accounting as to any dividends or interest collected in the meantime; he cannot hold the bank liable for a depreciation in the market value of the securities.[543] If the property transferred to the preferred creditor has been sold by him, or it is otherwise out of his power to return it, the trustee is entitled to a judgment for its value.[544] And where the bankrupt had given two mortgages on his stock of goods, both preferential, and the first mortgagee took possession, sold enough to pay his claim, and turned over the rest to the second mortgagee, and was then sued by the trustee in bankruptcy and

Atl. 538; Galveston Dry Goods Co. v. Frenkel (Tex. Civ. App.) 103 S. W. 224; Johnston v. George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153; Wilkinson v. Anderson-Taylor Co., 28 Utah, 346, 79 Pac. 46; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Chisholm v. First Nat. Bank, 269 Ill. 110, 109 N. E. 657; People's Bank of Mobile v. McAleer, 204 Ala. 101, 85 South. 413.

[539] Edwards v. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764.

[540] Johnston v. George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153.

[541] Jones v. Kinney, 5 Ben. 259, 4 N. B. R. 649, Fed. Cas. No. 7,473.

[542] Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Claridge v. Kulmer, 1 Fed. 399; Golden & Co. v. Loving, 42 App. D. C. 489.

[543] National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, 31 Am. Bankr. Rep. 291, affirming Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289.

[544] McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Claridge v. Kulmer, 1 Fed. 399; Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Drummond v. Smith, 118 N. Y. Supp. 718; Covington v. Brigman (D. C.) 210 Fed. 499, 32 Am. Bankr. Rep. 35.

his mortgage held void as a preference, it was held that he was liable for the value of the entire stock, and not merely for the value of the goods sold while the stock was in his possession.[545] If the preference consisted in a sale of the bankrupt's property to a creditor for less than half its value, but the amount received by the bankrupt has been turned over to the trustee, the latter is entitled to recover from the preferred creditor the difference between the amount so received and the value of the property.[546] For the purposes of a judgment in such cases, the value of the property preferentially transferred is to be taken as its actual market value at the time of the transfer, and not the sum which it brought on a sale of it by the preferred creditor or under process issued at his suit.[547] But if it appears that he sold the property to as good advantage as the trustee could have done, the creditor should not be held to account for more than he received.[548] And if the parties, at the trial, stipulate the market value of the property at the time of the transfer, the sum so fixed will be the measure of the defendant's liability.[549] And if the preference consisted in a judgment procured or suffered by the bankrupt, under which the creditor issued execution and sold property, he must restore the amount received on the judgment, but he may be allowed credit for the actual expenses of the sale, but not including the officer's fees.[550] The preferred creditor should also be charged with interest, but only from the time when demand was made on him for the surrender of the preference, as, after that time, he holds the property or fund as a trustee ex maleficio,[551] or, according to some of the authorities, only from the commencement of the action.[552] In the case where the money or property preferentially transferred would have been more than sufficient to pay in full all the remaining creditors of the bankrupt, only so much may be recovered by the trustee as is necessary for that purpose and for the costs and expenses of the bankruptcy proceedings.[553]

[545] Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327.

[546] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305.

[547] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[548] Allen v. McMannes, 156 Fed. 615, 19 Am. Bankr. Rep. 276.

[549] Gering v. Leyda, 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137.

[550] Sedgwick v. Millward, 5 N. B. R. 347, Fed. Cas. No. 12,618. Grant v. National Bank of Auburn (D. C.) 232 Fed. 201, 37 Am. Bankr. Rep. 329; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

[551] Benjamin v. Chandler, 142 Fed. 217, 15 Am. Bankr. Rep. 439; Ommen v. Talcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572; Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Utah Ass'n of Credit Men v. Boyle Furniture Co., 43 Utah, 523, 136 Pac. 572.

[552] Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837.

[553] Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502.

Where the suit is brought and judgment recovered in the bankruptcy court, the bill containing a prayer for general relief, the court is not limited to the entry of a money judgment against the preferred creditor, but may issue an order commanding him to pay the amount of the judgment to the trustee in bankruptcy, and may commit him for contempt until compliance.[554] And the defendant is not entitled to have judgment withheld until he has proved his claim and a dividend in his favor has been declared, and to have the amount thereof deducted from the judgment.[555] The court of bankruptcy, possessing the full powers of a court of equity, may also enforce equities of the defendant as against any other creditor who would be entitled otherwise to share in the recovery.[556] On the other hand, the dismissal of a bill by the trustee to set aside an alleged fraudulent preference, where the construction of the statute was doubtful, should be without costs.[557] The right to dower in land revives, where a conveyance of such land is set aside as an illegal preference under the bankruptcy law, or is surrendered by the preferred creditor.[558] Where one who has received a preference from a bankrupt becomes himself a bankrupt, the preference cannot be collected in full from his estate as a priority claim, either in the usual course of proceedings or on a composition.[559]

[554] In re Plant, 148 Fed. 87, 17 Am. Bankr. Rep. 272. See Ward v. Central Trust Co. (C. C. A.) 261 Fed. 344, 44 Am. Bankr. Rep. 328.

[555] Templeton v. Kehler, 173 Fed. 574, 23 Am. Bankr. Rep. 39. See Minnesota & Ontario Power Co. v. Losey, 260 Fed. 659, 171 C. C. A. 427, 44 Am. Bankr. Rep. 395.

[556] Allen v. McMannes, 156 Fed. 615, 19 Am. Bankr. Rep. 276.

[557] Collins v. Gray, 8 Blatchf. 483, 4 N. B. R. 631, Fed. Cas. No. 3,013.

[558] In re Detert, 11 N. B. R. 293, Fed. Cas. No. 3,829.

[559] In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459.

CHAPTER XXX

DEBTS ENTITLED TO PRIORITY

§ 617. Statutory Provisions.—The bankruptcy act of 1898, after providing for the payment of taxes in advance of the payment of any dividends to creditors, describes, as follows, the classes of debts which shall have priority and which shall be paid in full, and the order of their payment:

1. The actual and necessary cost of preserving the estate subsequent to filing the petition.

2. The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.

3. The cost of administration, including the fees and mileage payable to witnesses, and a reasonable attorney's fee for professional services rendered to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed by the act, and to the bankrupt in voluntary cases as the court may allow.

4. Wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant. And this clause was amended by the act of June 15, 1906 (34 Stat. 267), so as to include "traveling or city salesmen."

5. Debts owing to any person who, by the laws of the states or the United States, is entitled to priority.

This part of the statute was not repealed or in any way altered or affected by the amendatory act of June 25, 1910 (36 Stat. 838), which gives to the trustee in bankruptcy the rights of a creditor holding a lien.[1] And the section relating to priorities does not merely prescribe the order of distribution of assets after satisfaction of liens against the property, but it creates prior liens to the extent stated in favor of the classes of debts specified, and is enforceable without reference to state statutes relating to the same subject.[2] But it is not to be extended by an over liberal construction. It is contrary to the general policy of the bankruptcy law, to distribute the estate equally among all the creditors; and "a statute that takes from one creditor to pay another must be strictly construed and carefully administered by the courts."[3]

It has already been explained that creditors holding valid liens on specific property of the bankrupt, which liens are not divested or disturbed by the proceedings in bankruptcy, are entitled to satisfaction out of the property affected, or out of its proceeds if sold by the trustee, only the balance, if any, going into the general fund for distribution among unsecured creditors.[4] But the claims enumerated in the sixty-fourth section of the statute, and described as "debts to have priority," stand upon a different footing altogether. They do not take precedence of valid lien claims, but they have a position of privilege or preference as against all other unsecured debts, and are entitled to payment in full, in their relative rank and order, out of the general assets of the estate, in advance of the payment of any dividends to the general creditors.

§ 618. **General Rights of Creditors Entitled to Priority.**—A creditor entitled to priority under this section of the Bankruptcy Act should prove his claim in that character, except as to claims for taxes, which, as we have seen, are not required to be proved.[5] But if a creditor files his claim as a general claim and has it allowed in that character and receives a dividend on it, this does not necessarily estop him from afterwards asserting his right to preferential payment if there is nothing to show that the trustee or the other creditors have been prejudiced by the delay.[6] And if a creditor is entitled to priority for his claim, but only up to a certain amount (as, for instance, the $300 payable to a clerk

[1] In re Lausman (D. C.) 183 Fed. 647, 25 Am. Bankr. Rep. 186.

[2] In re McDavid Lumber Co. (D. C.) 190 Fed. 97, 27 Am. Bankr. Rep. 39.

[3] In re Nounnan & Co. (Utah) 7 N. B. R. 15. And see L. E. Waterman Co. v. Kline, 234 Fed. 891, 148 C. C. A. 489, 37 Am. Bankr. Rep. 252.

[4] Supra, Chapter XX, §§ 363–391. And see In re American Product Co., 224 Fed. 401, 140 C. C. A. 87, 35 Am. Bankr. Rep. 54; In re Octave Mining Co. (D. C.) 212 Fed. 457; Macy v. Roedenback, 227 Fed. 346, 142 C. C. A. 42, L. R. A. 1916C, 12, 36 Am. Bankr. Rep. 31; In re Nicol (D C.) 221 Fed. 82, 34 Am. Bankr. Rep. 465.

[5] Supra, § 524.

[6] Wuerpel v. Commercial Germania Trust & Savings Bank, 238 Fed. 269,

or servant) he should prove his claim for a preference to that amount, and prove the balance as a general or unsecured creditor.[7] A creditor entitled to priority is not allowed to participate in creditors' meetings or to vote at such meetings, except in so far as the amount of his claim may exceed the "value of such priority."[8] For instance, a clerk having a claim for wages earned within three months prior to the commencement of the proceedings, but amounting to more than three hundred dollars, should be allowed to vote only on the excess. If, however, a priority creditor does vote his whole claim at a creditors' meeting in the election of a trustee, this will not amount to a waiver of his right of priority, and will not estop him from claiming the same, at least where no other creditor is shown to have been prejudiced.[9] And taking the debtor's note does not discharge an original debt entitled to priority nor prevent the creditor from claiming his privilege.[10] It is also provided that the money necessary to pay all debts which have priority shall be deposited according to the directions of the court, before the court can consider the confirmation of a composition.[11] And where a bankrupt, having been discharged by performance of a composition agreement, promises one of his creditors to pay the full amount of his debt, and the debtor is again adjudged a bankrupt, there is no equity requiring such creditor to be postponed to others who have become creditors since the first bankruptcy proceedings on the faith of the former discharge.[12]

§ 619. **Relative Rank of Priority Claims.**—Claims entitled to priority of payment by this section of the statute do not outrank claims secured by valid liens. A mortgage or other lien given and accepted in good faith and for a present consideration, and which is not voidable as a preference or otherwise in fraud of the act, is recognized in the bankruptcy proceedings and its enforcement permitted as against the specific property to which it attaches. That property cannot be taken from the secured creditor and distributed among the claims entitled to priority. Their right of priority applies only to the general assets of the estate, and is a right of priority as against general or unsecured creditors. This is shown by the language of the statute, which gives priority to certain claims "except as herein provided," and which declares that valid liens "shall not be affected by this act."[13]

151 C. C. A. 285, 38 Am. Bankr. Rep. 223.

[7] In re Crawford Wollen Co. (D. C.) 218 Fed. 951, 34 Am. Bankr. Rep. 223; In re Floyd & Bohr Co. (D. C.) 200 Fed. 1016, 29 Am. Bankr. Rep. 149.

[8] Bankruptcy Act 1898, § 56b; Id. § 57e.

[9] In re Ashland Steel Co., 168 Fed. 679, 94 C. C. A. 165, 21 Am. Bankr. Rep. 834.

[10] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

[11] Bankruptcy Act 1898, § 12b.

[12] In re Merriman, 44 Conn. 587, Fed. Cas. No. 9,479.

[13] City of Richmond v. Bird, 249 U. S.

Further, as between the different classes of debts to which the statute gives priority, they do not all stand upon an equal footing, but have a relative rank and priority according to the order of their enumeration in the statute. For the law not only specifies the debts which shall have priority, but the "order of payment."[14] Hence if there is not enough money to satisfy all the priority claims, they are not to share pro rata, but be discharged in full in their order.[15] Thus, claims for wages, being enumerated in the fourth clause of the section, will take precedence over claims enumerated in the fifth clause, that is, "debts owing to any person who, by the laws of the states or the United States, is entitled to priority." Hence such labor claims must be paid in full in preference to a landlord's statutory lien for rent of the premises in which the bankrupt's business was carried on,[16] and even in preference to debts or claims due to the United States.[17] So, the actual and necessary cost of preserving the bankrupt's estate subsequent to filing the petition, which is an expense necessary to enable the court to exercise its jurisdiction is entitled to priority of payment over taxes due to the state.[18] And

174, 39 Sup. Ct. 186, 63 L. Ed. 543, 43 Am. Bankr. Rep. 260; Polk County, Iowa, v. Burns, 247 Fed. 399, 159 C. C. A. 453, 40 Am. Bankr. Rep. 727; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76; In re City Trust Co., 121 Fed. 706, 58 C. C. A. 126, 10 Am. Bankr. Rep. 231; In re Yoke Vitrified Brick Co,, 180 Fed. 235, 25 Am. Bankr. Rep. 18; In re Proudfoot, 173 Fed. 733, 23 Am. Bankr. Rep. 106; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Frock, 1 Nat. Bankr. News, 214; In re McConnell, 9 N. B. R. 387, Fed. Cas. No. 8,712. Contra, see In re Blackstaff Engineering Co., 200 Fed. 1019, 29 Am. Bankr. Rep. 663; In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689; In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235. But two of the three decisions last cited were rendered by the same judge, and in none of the three was any attention paid to the authorities opposed to their views.

[14] Bankruptcy Act 1898, § 64b.

[15] But see In re Grignard Lithographing Co. (D. C.) 158 Fed. 557, 19 Am. Bankr. Rep. 743, holding that, where the estate of the bankrupt is insufficient to pay in full the claims entitled to priority, the court may, where equity requires it, scale a claim which would ordinarily be entitled to priority over others. And it is in the power of the court to marshal claims and assets in such manner as to secure the payment of priority claims of two different classes, where, if this were not done, only one would be satisfied in full. In re Gerrow (D. C.) 233 Fed. 845, 37 Am. Bankr. Rep. 14.

[16] In re Woulfe & Co., 239 Fed. 128, 152 C. C. A. 170, 39 Am. Bankr. Rep. 91; In re Byrne (D. C.) 97 Fed. 762, 3 Am. Bankr. Rep. 268; Contra, see Lott v. Salsbury, 237 Fed. 191, 150 C. C. A. 337, 37 Am. Bankr. Rep. 796. But the lien of a landlord who had distrained property of the lessee before the bankruptcy proceedings were begun is superior to the claims of wage-earners. In re Mock (D. C.) 228 Fed. 94, 35 Am. Bankr. Rep. 9. And where wage-earners had priority as to two funds realized from the bankrupt's assets, while the landlord had priority as to only one, and the two claims exceeded the amount of the funds, it was adjudged that the claims of the wage-earners should first be satisfied out of the fund as to which the landlord had no lien. In re Gerrow (D. C.) 233 Fed. 845, 37 Am. Bankr. Rep. 14.

[17] Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873.

[18] State of New Jersey v. Lovell, 179 Fed. 321, 102 C. C. A. 505, 24 Am. Bankr. Rep. 562; In re Hosmer (D. C.) 233 Fed.

even among claims enumerated in the same class, there may be circumstances to give one a preference over others. Thus, where a state statute creates a lien in favor of employés performing labor in the manufacture of lumber, but provides that the debt or claim shall not remain a lien on the product, unless a statement thereof is filed within thirty days and an action begun within three months, holders of such claims, perfected according to the statute, against the estate of the employer in bankruptcy, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, and this although both classes of claims are equally claims for "wages" within the bankruptcy law.[19]

§ 620. **Assignment of Priority Claims.**—A claim which is accorded priority by the bankruptcy law itself, such as a claim for wages, or one which is given priority by the laws of the state, does not lose its right to be satisfied in full in advance of distribution to general creditors by the fact of its having been assigned to a third person before the commencement of the proceedings in bankruptcy,[20] or after the filing of the petition.[21] For the preference or priority is given to the debt, not to the person of the creditor; to the claim, and not to the claimant. And whereas the statute speaks of debts for wages "due to" workmen, clerks, etc., it is satisfied if the debt was originally so due, and does not mean that it must continue to be so due until bankruptcy proceedings are begun or until the claim is proved and allowed.[22] Thus, the fact that a large number of laborers holding claims for labor performed for the bankrupt assigned such claims to two of their number, who were also laborers and who held claims of their own, in order to save costs in prosecuting suits against the bankrupt to recover such wages, the assignees agreeing to account to their assignors for the amounts due each when collected, does not deprive the claims so assigned of their

318, 37 Am. Bankr. Rep. 464; In re Oxley (D. C.) 204 Fed. 826, 30 Am. Bankr. Rep. 406.

[19] In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402.

[20] Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, 17 Am. Bankr. Rep. 77; In re Bennett, 153 Fed. 673, 82 C. C A. 531, 18 Am. Bankr. Rep. 847; In re Fuller & Bennett, 152 Fed. 538, 18 Am. Bankr. Rep. 443; In re Brown, 4 Ben. 142, 3 N. B. R. 720, Fed. Cas. No. 1,974. But see In re Westlund, 99 Fed. 399, 3 Am. Bankr. Rep. 646.

[21] In re Campbell, 102 Fed 686, 4 Am. Bankr. Rep. 535.

[22] Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, 17 Am. Bankr. Rep. 77; In re Dutcher, 213 Fed. 908, 32 Am. Bankr. Rep. 545. It has been held that one who cashes checks given by a bankrupt to his workmen for wages is entitled to preference as an assignee of the claims for wages, since the checks, unpaid, did not discharge the debts for which they were given. In re Stultz Bros., 226 Fed. 989, 34 Am. Bankr. Rep. 783. But on the other hand, claimants who held undated time checks issued by the bankrupt to laborers for their wages, for which the claimants had given goods in exchange, under an arrangement with the bankrupt, without an assignment or contract with the laborers, were held not

right to priority.[23] But where one holding an assignment of claims for wages exchanges them with the bankrupt for the latter's note or other obligation, this operates as a novation of the wage claims and extinguishes the right of priority given to them by the statute.[24]

§ 621. **Priority of Taxes.**—The trustee in bankruptcy is directed by the statute to "pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in advance of the payment of dividends to creditors."[25] A state need not prove its claim in bankruptcy in order to recover taxes due to it on property of the bankrupt,[26] but a claim for taxes due either to the United States or to a state is entitled to priority over all other priority claims,[27] even over the trustee's commissions and his necessary expenses.[28] And it is immaterial that, through the negligence of the officers charged with the collection of taxes, they have accumulated until the aggregate amount with interest will absorb all or a large part of the estate.[29] Since the statute makes no distinction, it is held that taxes are entitled to priority of payment whether they were assessed before the commencement of the bankruptcy proceedings or during their pendency.[30] And it makes no difference that the taxes in question were levied on property which never passed into the hands of the trustee in bankruptcy,[31] or upon the exempt property of the bankrupt.[32] And the priority right of a county or municipality in respect to taxes due to it is

subrogated to the laborers' right to priority. In re McGowin Lumber Co. (D. C.) 223 Fed. 553, 35 Am. Bankr. Rep. 57. And see Bell v. Arledge, 219 Fed. 675, 135 C. C. A. 347; J. C. Stewart & Co. v. McLeod, 222 Fed. 253, 138 C. C. A. 75, 34 Am. Bankr. Rep. 414.

[23] In re Harmon, 128 Fed. 170, 11 Am. Bankr. Rep. 64.

[24] In re Fuller & Bennett, 152 Fed. 538, 18 Am. Bankr. Rep. 443.

[25] Bankruptcy Act 1898, § 64a.

[26] Stokes v. State, 46 Ga. 412, 12 Am. Rep. 588. That a trustee in bankruptcy who fails to pay a claim of the United States for customs duties may become personally liable therefor, see Walkof v. Fox, 90 Misc. Rep. 338, 153 N. Y. Supp. 27.

[27] In re Brand, 2 Hughes, 334, 3 N. B. R. 324, Fed. Cas. No. 1,809. But the provision of the statute giving priority to taxes applies only to general assets, and not to property subject to a valid lien, the taxes not having become a lien on that property. In re Hosmer (D. C.) 233 Fed. 318, 37 Am. Bankr. Rep. 464. Compare Delahunt v. Oklahoma County, 226 Fed. 31, 141 C. C. A. 139, 35 Am. Bankr. Rep. 157. Hence a city's unsecured claim for taxes due to it, which is not given any superior right by the local laws, does not come in ahead of a valid lien, such, for instance, as the lien of a landlord acquired by the levy of a distress warrant. City of Richmond v. Bird, 249 U. S. 174, 39 Sup. Ct. 186, 63 L. Ed. 543, 43 Am. Bankr. Rep. 260, affirming Bird v. City of Richmond, 240 Fed. 545, 153 C. C. A. 349, 39 Am. Bankr. Rep. 1.

[28] In re Weiss, 159 Fed. 295, 20 Am. Bankr. Rep. 247. But compare Polk County, Iowa, v. Burns, 247 Fed. 399, 159 C. C. A. 453, 40 Am. Bankr. Rep. 727.

[29] In re Weissman, 178 Fed. 115, 24 Am. Bankr. Rep. 150.

[30] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Flynn, 134 Fed. 145, 13 Am. Bankr. Rep. 720.

[31] City of Chattanooga v. Hill, 139 Fed. 600, 71 C. C. A. 584, 15 Am. Bankr. Rep. 195; City of Waco v. Bryan, 127 Fed. 79, 62 C. C. A. 79, 11 Am. Bankr. Rep. 481.

[32] In re Tilden, 91 Fed. 500, 1 Am.

not lost by the fact that the property assessed has been struck off to it at a tax sale for want of other bidders,[33] or for less than the amount due as taxes, as it will be entitled, in the latter case, at least to priority of payment of the balance due.[34]

Under the bankruptcy act of 1867, it was held that a debt due for taxes from a bankrupt to a state other than that in which the bankruptcy proceedings were pending was not entitled to a preference.[35] But this was because that statute gave priority to "all debts due to the state in which the proceedings in bankruptcy are pending and all taxes and assessments made under the laws thereof." The absence of such a provision in the present statute would seem to indicate that it was not the intention of Congress to restrict the priority of taxes to those due to the bankrupt's home state. The fact that the word "state" is used in the singular number in this sentence of the bankruptcy law need not affect this interpretation, since the same thing is true of the following words "county, district, or municipality." Evidently the sentence should be read as if it referred to taxes due "to the United States or to any state, county, district, or municipality." It should be observed, however, that if there is any statute of limitations applicable to the tax in question, such as a municipal tax, it may be invoked by the trustee in bankruptcy as a protection against being required to pay the tax.[36] And further, this provision of the bankruptcy law is to be construed in accordance with equitable principles, such as that of the marshaling of assets; and where taxes due to a county are a lien on property of the bankrupt, the greater portion of which has been taken to satisfy a mortgage, leaving no more than enough to pay the costs and expenses of administration, it is within the power of the court to require the county to resort to the mortgaged property.[37]

The claim of a state or municipality for taxes is against the owner of the property on which the tax is assessed. Where the bankrupt is not the owner of such property, but a lessee of it, the state or municipality cannot come upon his estate in bankruptcy with a preferential claim for payment of the taxes, though he covenanted in the lease to pay all taxes assessed upon the property. For such a covenant is not made for the benefit of the state or municipality and cannot be enforced by it. It simply creates a debt in favor of the owner of the property.[38]

Bankr. Rep. 300; In re Baker, 1 Nat. Bankr. News, 212.

[33] Hecox v. Teller County (C. C. A.) 198 Fed. 634, 28 Am. Bankr. Rep. 525.

[34] In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[35] In re Ambler, 8 Ben. 176, Fed. Cas. No. 271. But as to the present statute, see New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63.

[36] In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[37] In re Oxley, 204 Fed. 826, 30 Am. Bankr. Rep. 406.

[38] In re Broom, 123 Fed. 639, 10 Am.

And if the owner pays the taxes, which the bankrupt lessee had covenanted to pay, he may prove a claim therefor as a general creditor in the bankruptcy proceedings, but is not entitled to be subrogated to the rights of the state or municipality so as to occupy the position of a creditor entitled to priority.[39] Further, where the bankrupt had been county tax collector, his indebtedness to the county for taxes collected and not accounted for, or for taxes which should have been collected and for which he is liable under the laws of the state, is not a debt for "taxes legally due and owing by the bankrupt" to the county, and therefore is not entitled to priority.[40]

A sale of the land by the trustee in bankruptcy does not divest the lien of the state for taxes due upon it, even though the sale was made free of incumbrances.[41] But in that case the taxes are to be paid by the purchaser at the sale, rather than out of the funds of the estate in bankruptcy, at least if the amount realized is not more than enough to discharge liens;[42] and the purchaser, paying the taxes, is not subrogated to the rights of the taxing power so as to claim priority.[43]

The same section of the bankruptcy law provides that, "in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court," that is, the court of bankruptcy in which the proceedings are pending. This applies to taxes due to the United States; and the trustee in bankruptcy may resist such a tax, and have the accuracy or justice of the claim therefor determined by the bankruptcy court, and he is not obliged to take the course of first paying the tax claimed and then filing a claim for a refund.[44] In general, where the claim of a state or municipality against a bankrupt for unpaid taxes is supported by sworn valuations which appear neither unjust nor illegal, the claim must be allowed as a priority claim, without reference to the hardship it may work on general creditors.[45] But the court of bankruptcy is to inquire into all such matters, and it is not limited to such defenses or objections as the bankrupt himself might have

Bankr. Rep. 427; In re Siegel-Hillman Dry Goods Co., 2 Nat. Bankr. News, 856.

[39] Cooper Grocery Co. v. Bryan, 127 Fed. 815, 62 C. C. A. 495, 11 Am. Bankr. Rep. 734; In re Parker, 6 Ben. 286, Fed. Cas. No. 10,719.

[40] In re Waller, 142 Fed. 883, 15 Am. Bankr. Rep. 753.

[41] Stokes v. State, 46 Ga. 412, 12 Am. Rep. 588, 9 N. B. R. 191; Mesker v. Koch, 76 Ind. 68; Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498. Compare In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[42] In re Brinker, 128 Fed. 634, 12 Am. Bankr. Rep. 122; In re Conhaim, 100 Fed. 268, 4 Am. Bankr. Rep. 58; In re Veitch, 101 Fed. 251, 4 Am. Bankr. Rep. 112. See In re Harvey, 122 Fed. 745, 10 Am. Bankr. Rep. 567.

[43] In re M. I. Hibbler Machine Supply Co. (D. C.) 192 Fed. 741, 27 Am. Bankr. Rep. 612.

[44] In re W. P. Williams Oil Corporation (D. C.) 265 Fed. 401, 45 Am. Bankr. Rep. 278. In re General Film Corporation (C. C. A.) 274 Fed. 903.

[45] In re Bushnell (D. C.) 215 Fed. 651, 33 Am. Bankr. Rep. 47.

raised against the tax. So, for instance, the state's claim for a tax should not be allowed where it was based upon the bankrupt's false and padded return, when, if the real facts had been disclosed, no assessment could properly have been made.[46] And the findings or determinations of state officers in fixing the amount of an annual license or franchise tax on a corporation are not conclusive on the court of bankruptcy, which may independently review the amount and legality of the tax.[47] And the court may refuse to allow a claim for personal taxes on the ground that the property supposed to be taxed did not actually exist.[48]

§ 622. Same; What Taxes Included.—The provision of the bankruptcy act requiring the trustee to pay all taxes legally due and owing by the bankrupt intends that, while the estate is in the hands of the trustee, his custody of it shall not operate as a bar to the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself.[49] Hence the funds of the estate in the hands of the trustee are subject to state and local taxation in that taxing district where the values might have been assessed for taxation if the bankruptcy had not supervened, and on proper application the court will order the payment of such taxes by the trustee, as coming within the spirit, if not the letter, of the bankruptcy act.[50] In effect, the word "tax," as used in this part of the law, is not employed in any restricted sense, but broadly, so as to include all obligations imposed by the state and general governments under their respective taxing or police powers for governmental or public purposes; and hence it will include a license fee or tax imposed on the privilege of carrying on certain lines of business supposed to require regulation under the police power, such as dealing in intoxicating liquors or cigarettes.[51] The term will also include an annual license fee or franchise tax imposed on a corporation by the state which granted its charter, though it does no business and has no property in that state.[52] But a bonus required by the state law to be paid to the state by any corporation on increasing its

[46] In re E. C. Fisher Corp. (D. C.) 229 Fed. 316, 36 Am. Bankr. Rep. 509.

[47] In re Heffron (D. C.) 216 Fed. 642, 33 Am. Bankr. Rep. 443; In re Simcox, Inc. (D. C.) 243 Fed. 479, 40 Am. Bankr. Rep. 195; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63.

[48] In re Otto Fruend Arnold Yeast Co. (D. C.) 178 Fed. 305, 24 Am. Bankr. Rep. 458.

[49] In re Conhaim (D. C.) 100 Fed. 268, 4 Am. Bankr. Rep. 58; Compare In re Booth, 14 N. B. R. 232, Fed. Cas. No. 1,645.

[50] In re Sims (D. C.) 118 Fed. 356, 9 Am. Bankr. Rep. 162.

[51] In re Otto F. Lange Co., 159 Fed. 586, 20 Am. Bankr. Rep. 478. But see In re Ott, 95 Fed. 274, 2 Am. Bankr. Rep. 637.

[52] New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63; In re Halsey Electric Generator Co., 175 Fed. 825, 23 Am. Bankr. Rep. 401.

capital stock, is not a tax.[53] And an obligation imposed by state statute on corporations doing business within the state to collect from resident holders of its bonds or other obligations the state tax on such bonds, by the process of having the treasurer of the corporation withhold the amount of such tax from the interest due the bondholders, is not a tax on the corporation, though it is liable to the state therefor, and hence is not entitled to priority of payment out of the estate of the corporation in bankruptcy.[54] It is also held that water rents due to a municipality, which are levied annually on property as a tax is levied and made a lien in like manner, are "taxes" within the meaning of the bankruptcy law.[55] And it appears that the same is true of assessments levied for local improvements, at least if the law of the particular state, as interpreted by its courts, regards and treats them as taxes and gives the same remedies for their enforcement.[56] But an assessment levied on an employer of labor under the workmen's compensation act of a state is not a "tax" entitled to priority of payment.[57] Where interest accrues on delinquent taxes, and the law is such that the eventual payment of the taxes with the accrued interest is equivalent to their payment at the appointed time, the interest is a part of the tax and therefore entitled to priority of payment. But a penalty imposed for the nonpayment of the tax when due is not a part of the tax and not entitled to priority; and the fact that a statute requiring payment of an additional sum if the tax is not paid when due calls such sum "interest" is not conclusive on the bankruptcy court that it is not a penalty.[58]

§ 623. Costs and Expenses of Administration.—Priority is given to "the actual and necessary cost of preserving the estate subsequent to filing the petition." And even where property of the estate is turned over to the admiralty court to be sold for the satisfaction of maritime liens, the proceeds of the sale are subject to the payment of the necessary costs incurred by the bankruptcy court in preserving the property until it was so turned over.[59] The costs or expenses here intended are such as accrue in connection with the custody and preservation of the property in the interval between the filing of the petition and the ap-

[53] Commonwealth of Pennsylvania v. York Silk Mfg. Co., 192 Fed. 81, 112 C. C. A. 613, 27 Am. Bankr. Rep. 525.

[54] In re York Silk Mfg. Co., 188 Fed. 735, 26 Am. Bankr. Rep. 650; In re Wyoming Valley Ice Co., 145 Fed. 267, 16 Am. Bankr. Rep. 594.

[55] In re Industrial Cold Storage & Ice Co., 163 Fed. 390, 20 Am. Bankr. Rep. 604; In re Moller, 14 Blatchf. 207, Fed. Cas. No. 9,700. But compare In re Hills, 221 Fed. 260, 137 C. C. A. 150, 34 Am. Bankr. Rep. 43.

[56] In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[57] In re Farrell (D. C.) 211 Fed. 212, 32 Am. Bankr. Rep. 212.

[58] In re Ashland Emery & Corundum Co. (D. C.) 229 Fed. 829, 36 Am. Bankr. Rep. 194. And see supra, § 512.

[59] In re Hughes, 170 Fed. 809, 22 Am. Bankr. Rep. 303.

pointment of a trustee. After the trustee takes charge, similar expenses will be classed as "costs of administration." Among them may be included the expense of storage of the property and the pay of a watchman or keeper,[60] and rent of the store or other building occupied by the bankrupt as his place of business,[61] though not the rent of such portion of the building as he occupies as a residence.[62] And an expert employed by the bankrupt, after the commencement of the proceedings and before the adjudication, with the consent of the creditors, to make certain surveys, and calculations having an important bearing on the collection of the bankrupt's claims against third persons, and who renders services which inure largely to the benefit of the creditors, may have a preferred claim for his compensation.[63] But one who has paid the premium on a policy of fire insurance held by him under a pledge, and which is afterwards assigned to the receiver of the assured in bankruptcy, is not entitled to a preference for the payment of such claim, and the payment of the same by the receiver is not authorized.[64]

Next in order of priority are the filing fees paid by creditors in involuntary cases; and to this the amendatory act of 1903 added a provision that when property transferred or concealed by the bankrupt is recovered for the benefit of the estate by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery shall likewise have priority. This, however, was not retroactive and did not apply to bankruptcy proceedings begun before its enactment.[65] The fees paid by voluntary bankrupts on filing their papers are naturally not returnable to them, but it has been held that a person advancing money to the bankrupt to pay the fees, has a first lien on the estate for its repayment.[66] The "costs of administration" are next entitled to satisfaction, and these will include the commissions of the referee and trustee,[67] and ordinary and necessary expenses incurred in caring for and collecting the estate of the bankrupt, but not usually the cost of continuing the bankrupt's business,[68] nor expenditures made by the receiver or trustee, for the sole benefit of general creditors, in carrying out con-

[60] In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38; In re Mitchell, 212 Fed. 932, 129 C. C. A. 452.

[61] Supra, §§ 211, 307, 522.

[62] In re Hersey, 171 Fed. 1001, 22 Am. Bankr. Rep. 860.

[63] In re Nounnan & Orr, 1 Utah, 44.

[64] In re Hamilton, 102 Fed. 683, 4 Am. Bankr. Rep. 543.

[65] In re Felson (D. C.) 139 Fed. 275, 15 Am. Bankr. Rep. 185. Creditors contributing to the expense of litigation by the trustee are not generally entitled to preferential payment from the fund recovered, beyond repayment of their expense contributions. In re Butcher (D. C.) 266 Fed. 239, 45 Am. Bankr. Rep. 300.

[66] Whiston v. Smith, 2 Low. 101, Fed. Cas. No. 17,523.

[67] In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22.

[68] In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. Bankr. Rep. 585. See Searle v. Mechanics' Loan & Trust Co., 249 Fed. 942, 161 C. C. A. 213, 41 Am. Bankr. Rep. 786.

tracts of the bankrupt which were thought to be profitable.[69] And it is important to observe that the costs which are given priority are costs incurred in the bankruptcy proceedings itself or in connection with it. A claim for taxable costs incurred by a creditor in good faith before the filing of the petition in an action to recover a provable debt, is a claim which may be proved and allowed in the bankruptcy proceedings, but it is not a debt entitled to priority of payment,[70] unless there is some provision of the local law under which such costs may claim a preference.[71] But an assignee for the benefit of creditors, whose functions are superseded by the institution of bankruptcy proceedings against the assignor, has a lien on the assets and a preferred claim for his necessary disbursements and for the reasonable value of his services and those of his counsel, in so far as such services increased or benefited the estate of the bankrupt.[72]

As to the position of secured creditors, the better opinion is that the holder of a lien on specific property of the bankrupt, the validity of which is not disputed, is entitled to payment in full from the proceeds of the property, when it is sold by the trustee, with interest to the time of payment, and cannot be required to contribute anything to the general expenses of the bankruptcy proceeding.[73] But a secured creditor who makes use of the bankruptcy court and its officers to realize on his security may be required to contribute his proportion to the costs of the proceedings, and especially for the preservation of the property during their pendency, where there is not sufficient unincumbered estate for the purpose.[74]

§ 624. **Receivers' Certificates.**—The amount of an issue of receiver's certificates authorized by a court of bankruptcy, to raise the money required for the care and preservation of the property of the estate, rep-

[69] In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. Bankr. Rep. 585.

[70] In re The Copper King, 143 Fed. 649, 16 Am. Bankr. Rep. 148; In re Daniels, 110 Fed. 745, 6 Am. Bankr. Rep. 699; In re Beaver Coal Co., 107 Fed. 98, 5 Am. Bankr. Rep. 787; In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38.

[71] In re Daniels, 110 Fed. 745, 6 Am. Bankr. Rep. 699; In re Lewis, 99 Fed. 935, 4 Am. Bankr. Rep. 51.

[72] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Chase, 124 Fed. 753, 59 C. C. A. 629. Compare Stearns v. Flick, 103 Fed. 919, 4 Am. Bankr. Rep. 723; In re Peter Paul Book Co., 104 Fed. 786, 5 Am. Bankr. Rep. 105. See, supra, § 444. As to compensation of a receiver appointed by a state court, see In re J. H. Alison Lumber Co., 137 Fed. 643, 14 Am. Bankr. Rep. 78. And see Paine v. Archer, 233 Fed. 259, 147 C. C. A. 265, 37 Am. Bankr. Rep. 454; Hume v. Myers, 242 Fed. 827, 155 C. C. A. 415, 39 Am. Bankr. Rep. 401; In re Cooper (D. C.) 243 Fed. 797, 40 Am. Bankr. Rep. 17.

[73] In re Allert, 173 Fed. 691, 23 Am. Bankr. Rep. 101; In re Clark Coal & Coke Co., 173 Fed. 658, 23 Am. Bankr. Rep. 273. But see In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; Loving v. Moore, 37 App. D. C. 214.

[74] In re J. H. Alison Lumber Co. (D. C.) 137 Fed. 643, 14 Am. Bankr. Rep. 78.

resents an expenditure for the benefit of all parties in interest, and such certificates are entitled to priority of payment out of the proceeds of such property.[75] The same is true of certificates issued by the receiver to raise money for the purpose of carrying on the business of the bankrupt.[76] But in a case of this kind, it appeared that the receiver had been authorized to borrow the sum of $10,000, and began by borrowing half of that amount, for which he issued certificates. These were purchased by a company which was the surety on the bankrupt's bond guaranteeing the performance of the contracts which the receiver expected to complete. He also incurred other indebtedness of the same character, for which no certificates were issued, to an amount in excess of the authorized limit, all of which was done with the knowledge of the surety company, to which the receiver paid $1,000 on account of the certificates which it held. It was held that the holders of the debts incurred by the receiver, for which no certificates were issued, to the amount of $6,000, were entitled to participate in the bankrupt's assets in the hands of the receiver on the same footing with the remaining $4,000 of the certificates.[77]

§ 625. **Attorney's Claim for Services.**—Under the bankruptcy law of 1867, an attorney's claim for legal services rendered to the bankrupt in preparing the petition and schedules, and for advice in relation thereto, was not a privileged or priority debt.[78] But this is changed by the present statute, which includes among the "costs of administration," as entitled to priority, "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."[79] The attorney of a voluntary bankrupt may therefore claim priority for his fee, though the amount of it is to be fixed by the court. But he will be held to have waived this right of priority if he makes the mistake of including

[75] In re Alaska Fishing & Development Co. (D. C.) 167 Fed. 875, 21 Am. Bankr. Rep. 685.

[76] Where it was to the interest of secured creditors, who held liens on the property of the bankrupt, that the plant should be put into successful operation, and they acquiesced in the appointment of a receiver and in the sale of the property by the trustee free from their liens, receiver's certificates, lawfully issued, are entitled to priority in payment out of the proceeds of the property, even over the liens of the secured creditors. In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[77] In re Restein (D. C.) 162 Fed. 986, 20 Am. Bankr. Rep. 832.

[78] In re Hirschberg, 2 Ben. 466, Fed. Cas. No. 6,530; In re Jaycox, 7 N. B. R. 140, Fed. Cas. No. 7,239.

[79] Bankruptcy Act 1898, § 64b. For professional services rendered before the bankruptcy, an attorney is merely a general creditor, entitled to no priority, though he may have a charging lien on the papers in his hands. Kraus v. Century Gas & Electric Fixture Co., 161 App. Div. 916, 145 N. Y. Supp. 1086.

his fee in the bankrupt's list of debts as an unsecured claim.[80] And it may be proper for the court, in its discretion, to reject such claim altogether, as was done in a case where the purchaser of property subject to a mortgage, while a foreclosure suit was pending in a state court, filed his voluntary petition in bankruptcy, with the manifest intention of acting adversely to the interests of the mortgagee.[81] As for the compensation of attorneys employed by the trustee in bankruptcy, it is held that this is properly included in the "costs of administration," although the statute does not so specify, the allowance of a fee to the attorney for "the petitioning creditors" not being exclusive of the right to allow a priority claim to the attorneys for the trustee.[82] Thus, where an attorney is retained by the trustee in a suit to recover a voidable or fraudulent preference made by the bankrupt, his reasonable fee should be allowed as a part of the expenses of administration and accorded priority of payment.[83]

§ 626. **Wages of Workmen, Clerks, and Servants.**—Priority is given by the bankruptcy act to "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant."[84] A claimant who comes within the statute does not lose his right of priority by reason of the fact that, within four months before the bankruptcy and while the employer was insolvent, he recovered a judgment against him for the wages due.[85] And the claim of a father for the wages due to his minor son, employed by the bankrupt, is entitled to the same priority.[86] But a claim for wages for an unexpired term of employment, the employé having been wrongfully discharged, is not entitled to priority, because in reality the demand is for damages for breach of the contract, and not for "wages which have been earned," etc.[87] And where, by agreement, a clerk permits his employer to retain a certain portion of his wages each week to form a fund which is to be

[80] In re Morris, 125 Fed. 841, 11 Am. Bankr. Rep. 145.

[81] Liddon & Bro. v. Smith, 135 Fed. 43, 67 C. C. A. 517, 14 Am. Bankr. Rep. 204.

[82] In re Standard Fuller's Earth Co., 186 Fed. 578, 26 Am. Bankr. Rep. 562; In re Grignard Lithographing Co., 158 Fed. 557, 19 Am. Bankr. Rep. 743.

[83] Page v. Rogers, 149 Fed. 194, 79 C. C. A. 153, 17 Am. Bankr. Rep. 854.

[84] Bankruptcy Act 1898, § 64b, cl. 4. See In re Little Elk Logging Co. (D. C.) 218 Fed. 142, 33 Am. Bankr. Rep. 592. Where the trustee was authorized to continue under the bankrupt's contract and to borrow money, the lender to have a lien subject only to the costs of administration, laborers and materialmen were held entitled to priority. In re John W. Farley & Co., 227 Fed. 378, 142 C. C. A. 74, 36 Am. Bankr. Rep. 88.

[85] In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428; In re Anson (D. C.) 101 Fed. 608, 4 Am. Bankr. Rep. 231. But see In re Burton Bros. Mfg. Co. (D. C.) 134 Fed. 157, 14 Am. Bankr. Rep. 218.

[86] In re Harthorn, 4 N. B. R. 103, Fed. Cas. No. 6,162.

[87] In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604; In re Pevear, 17 N. B. R. 461, Fed. Cas. No. 11,053.

paid to the clerk or used for his benefit later, and the employer becomes bankrupt, the clerk cannot claim priority for the sums so retained during the preceding three months as "wages," because the fund has become, by the contract between the parties, a debt of a different class.[88] And orders for goods, drawn by a manufacturing company in favor of its employés, are not preferred claims in the hands of the drawees against the estate of the company in bankruptcy.[89]

As to the terms "workmen," "clerks," and "servants," these must be understood in their ordinary and popular signification, as they are not terms of art.[90] A workman is a laborer, mechanic, or operative. He is distinguished from a "servant" in the nature of his employment, and from a "clerk" in that his labor is manual or mechanical, rather than intellectual. He is also an artisan or craftsman, as distinguished from those who direct, superintend, or employ the labor of others. Thus, a civil engineer employed on the construction of a railroad is not a workman or laborer,[91] nor a carter or teamster, in so far as concerns the services of his team.[92] One employed as a salesman in a store or shop is a "clerk" within the meaning of the statute,[93] and so is a bookkeeper,[94] and one employed for a temporary service in adjusting the books and accounts of the bankrupt.[95] As to "servants," it has been held under analogous statutes that this word embraces only those who in common parlance are called servants, that is, "hirelings who make a part of a man's family, employed for money, to assist in the economy of the family or in matters connected with it." [96] "A servant is one who is engaged not merely in doing work or services for another, but who is in his service, usually upon or about the premises or property of his employer, and subject to his direction and control therein, and who is generally liable to be dismissed." [97] Yet the courts have striven to carry out the obvious purpose of the bankruptcy law to give special protection to those who are dependent on their daily earnings, and in so doing have given a

[88] In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93; In re Flick (D. C.) 105 Fed. 503, 5 Am. Bankr. Rep. 465.

[89] In re Erie Rolling Mill Co. (D. C.) 1 Fed. 585.

[90] That the compensation of an employee of the bankrupt was more than $1,500 a year, so that he is not within the definition of a "wage earner" in another part of the statute, does not of itself prevent him from claiming priority as a workman, clerk or servant. In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604.

[91] Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189. On the same principle, the claim of a mining engineer for unpaid salary is not entitled to priority. In re Gay & Sturgis (D. C.) 233 Fed. 604, 36 Am. Bankr. Rep. 350.

[92] Spruks v. Lackawanna Dairy Co., 189 Fed. 287, 26 Am. Bankr. Rep. 554.

[93] In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465.

[94] In re Baumblatt, 156 Fed. 422, 19 Am. Bankr. Rep. 500.

[95] Ex parte Rockett, 2 Low. 522, 15 N. B. R. 95, Fed. Cas. No. 11,977.

[96] Boniface v. Scott, 3 Serg. & R. (Pa.) 351.

[97] Heygood v. State, 59 Ala. 49; Morgan v. Bowman, 22 Mo. 538.

very elastic construction to this term. Thus, it is held that musicians employed at regular wages to play in a theater, restaurant, roof garden, or other such place, are "servants" for the purpose of this statute.[98] And so likewise, there are decisions that persons who are engaged as conductors or other employés on railroad trains come within the definition of "servants."[99] But "wages" is the reward paid for labor. And while it is none the less wages because the labor is paid for by the piece, yet compensation for labor is not wages where payment is by the job, nor where it consists of the profits derived from the labor of others, and this, though the claimant himself takes part in the work.[100] Therefore one who undertakes the performance of a definite piece of work, not under a contract for his personal labor or service, but under a contract for the performance of the work, is not a "workman," but a contractor, and the compensation due him is not "wages," though he may put his own hand to the work.[101]

Neither of the terms employed in this section of the bankruptcy act can properly be made to include one who is in general charge and command of a business, or of a branch of it, or an officer of a corporation such as the president, secretary, treasurer, or general manager. Persons in this class of employment are not "workmen, clerks, or servants," and arrears of salary due to them cannot be described as wages.[102] Nor is the rule altered by the fact that such a person may occasionally or incidentally perform services of a clerical or mechanical or menial character.[103] Regard is to be had to the general character and scope of his du-

[98] In re Caldwell, 164 Fed. 515, 21 Am. Bankr. Rep. 236. But compare In re All Star Feature Corp. (D. C.) 231 Fed. 251, 36 Am. Bankr. Rep. 655, in which it was held that an actress, contracting to fill a four-week's engagement at a high salary, was not classifiable as a workman or servant.

[99] Heygood v. State, 59 Ala. 49; Conant v. Van Schaick, 24 Barb. (N. Y.) 87.

[100] In re Thomas Deutschle & Co., 182 Fed. 430, 25 Am. Bankr. Rep. 343.

[101] In re Thomas Deutschle & Co. 182 Fed. 430, 25 Am. Bankr. Rep. 343; In re Quackenbush (D. C.) 259 Fed. 599, 43 Am. Bankr. Rep. 699; In re Footville Condensed Milk Co. (D. C.) 237 Fed. 136, 38 Am. Bankr. Rep. 472; Campfield v. Lang, 25 Fed. 128; In re Rose, 1 Nat. Bankr. News, 212; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581.

[102] Keyes v. Davie, 231 Fed. 688, 145 C. C. A. 574, 36 Am. Bankr. Rep. 884; In re Metropolitan Jewelry Co. (D. C.) 216 Fed. 384; Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895; In re Bonk (D. C.) 270 Fed. 657, 46 Am. Bankr. Rep. 503; In re Crown Point Brush Co., 200 Fed. 882, 29 Am. Bankr. Rep. 638; In re Albert O. Brown & Co., 171 Fed. 281, 22 Am. Bankr. Rep. 496; In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Grubbs Wiley Grocery Co., 96 Fed. 183, 2 Am. Bankr. Rep. 442; Wells v. Southern Minnesota Ry. Co., 1 Fed. 270; Coffin v. Reynolds, 37 N. Y. 640. Where five workingmen organized a corporation, each paying in a sum of money, and one of them acted as treasurer and director, in addition to working in the shop, it was considered that his claim for compensation as such treasurer was not entitled to priority over the general creditors of the corporation. In re Boston French Range Co. (D. C.) 235 Fed. 916, 37 Am. Bankr. Rep. 508.

[103] Wintermote v. MacLafferty, 233 Fed. 95, 147 C. C. A. 165, 37 Am. Bankr. Rep. 425; In re Eagle Ice & Coal Co. (D. C.) 241 Fed. 393, 39 Am. Bankr. Rep. 184; In re Continental Paint Co. (D. C.) 250 Fed. 189, 34 Am. Bankr. Rep. 282.

ties, as defined by the rules or by-laws of the company or the contract under which he serves. Thus, the fact that the manager of a branch store of the bankrupt, in addition to his duties as manager, sold goods, kept the store clean, and kept the accounts, does not make him a workman or clerk or servant, so as to entitle him to priority.[104] On the other hand, a bookkeeper, employed as such and working in that capacity up to the time of the bankruptcy of his employer, a corporation, is entitled to priority notwithstanding the fact that he had been elected treasurer of the company, in place of one who resigned, and held that office for some time, where he received no salary as treasurer, and did nothing in that office except to sign checks when directed to do so by the president of the company.[105] And the steward of a bankrupt corporation operating a restaurant was held entitled to priority of payment of his wages, though he was also a director and officer of the company, where his acts and functions in the latter capacity were purely formal.[106]

A state statute cannot enlarge the class of persons to whom the bankruptcy law gives priority in the character of "workmen, clerks, or servants." Though a person not a workman, clerk, or servant might come under the description of "employé," or similar comprehensive term, in a state statute giving priority of payment, this would not entitle him to priority in bankruptcy. For the clause specifically relating to labor claims is not affected or enlarged by that relating to claims entitled to priority under the laws of a state.[107]

The wife and children of the bankrupt are not to be excluded from the class of creditors entitled to priority of payment, merely on account of the relationship, if they have rendered services to the bankrupt, such as

See Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239, 37 Am. Bankr. Rep. 719. But a claim for salary was held entitled to priority where the claimant, although he was the superintendent of a shop, having authority to hire and discharge men, subject to the control of the general manager, did the same kind of work as the other men in the shop. Blessing v. Blanchard, 223 Fed. 35, 138 C. C. A. 399, Ann. Cas. 1916B, 341, 35 Am. Bankr. Rep. 135.

[104] In re Greenberger (D. C.) 203 Fed. 583, 30 Am. Bankr. Rep. 117.

[105] In re H. O. Roberts Co. (D. C.) 193 Fed. 294, 27 Am. Bankr. Rep. 437. And see In re Capital Paint Co. (D. C.) 239 Fed. 424.

[106] In re Swain Co. (D. C.) 194 Fed. 749, 28 Am. Bankr. Rep. 66.

[107] In re Crown Point Brush Co., 200 Fed. 882, 29 Am. Bankr. Rep. 638; In re Slomka, 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635; In re Shaw, 109 Fed. 782, 6 Am. Bankr. Rep. 501; In re Reiser, 2 Nat. Bankr. News, 859. But compare In re City Trust Co., 121 Fed. 706, 58 C. C. A. 126, 10 Am. Bankr. Rep. 231; In re Kerby-Denis Co., 94 Fed. 818, 2 Am. Bankr. Rep. 218. But see In re Western Condensed Milk Co., 261 Fed. 62, 171 C. C. A. 658, 44 Am. Bankr. Rep. 558. In this case it was held that claims of laborers, filed and allowed as preferred debts by a state court under the state law against a corporation under receivership, were entitled to priority on the subsequent bankruptcy of the corporation, as debts given priority by the laws of the state, although the services were rendered more than three months prior to the bankruptcy.

would be rendered by any other "workman, clerk, or servant," within three months prior to the bankruptcy.[108]

§ 627. **Same; Traveling Salesmen.**—The courts held at first that a traveling salesman or "drummer" was not a workman nor a clerk or servant of his employer within the meaning of those terms as used in the bankruptcy act, and was therefore not entitled to priority of payment,[109] and that when he sold goods on a commission, his earnings could not be described as "wages." [110] But this clause of the statute was amended in 1906, by incorporating the words "traveling or city salesmen," so that, at present, priority is given to "wages due to workmen, clerks, traveling or city salesmen, or servants." [111] This amendment, however, was not retroactive.[112] The doctrine now prevails that compensation payable in the form of commissions on the price of goods sold is to be treated as "wages." [113] And a salesman comes within the meaning of the statute, when the principal and important part of his employment, to which all else is subordinate, is the selling of goods or soliciting orders for goods. Thus a person of whom this is true is none the less a salesman and entitled to priority in that character, because it is a part of his duty to see to the installation of the goods produced and sold by his employer,[114] or because he exercises his own discretion as to when and where he shall travel and maintains an office in a city at his own expense,[115] or because he is placed in charge of a branch office, where the office itself and his work in it is subordinate and auxiliary to his work as traveling salesman.[116]

§ 628. **Same; Limitation of Three Months.**—Priority is given by the statute to wages only when "earned within three months before the date of the commencement of proceedings." Hence, although a claim may clearly be of such a character as to come within the statute, yet if

[108] In re Strauch (D. C.) 208 Fed. 842, 31 Am. Bankr. Rep. 36; In re Starr (D. C.) 232 Fed. 416, 36 Am. Bankr. Rep. 426; In re Davidson (D. C.) 233 Fed. 462, 37 Am. Bankr. Rep. 480.

[109] In re Scanlan, 97 Fed. 26, 3 Am. Bankr. Rep. 202; In re Greenewald, 99 Fed. 705, 3 Am. Bankr. Rep. 696. But see Gravatt v. State, 25 Ohio St. 162.

[110] In re Mayer, 101 Fed. 227, 4 Am. Bankr. Rep. 119.

[111] Act Cong. June 15, 1906, 34 Stat. 267, amending Bankruptcy Act 1898, § 64b.

[112] In re Photo Electrotype Engraving Co., 155 Fed. 684, 19 Am. Bankr. Rep. 94.

[113] In re Dexter, 158 Fed. 788; In re Fink, 163 Fed. 135, 20 Am. Bankr. Rep. 897; In re New England Thread Co., 154 Fed. 742, 18 Am. Bankr. Rep. 840; In re National Marble & Granite Co., 206 Fed. 185, 31 Am. Bankr. Rep. 80. But partners who sold goods for the bankrupt on a commission basis, maintaining their own office, and not being bound to devote any particular amount of their time to selling the bankrupt's property, are not "traveling salesmen." In re Kominers (D. C.) 252 Fed. 183, 40 Am. Bankr. Rep. 431.

[114] In re Roebuck Weather Strip & Wire Screen Co., 180 Fed. 497, 24 Am. Bankr. Rep. 532.

[115] In re Dexter, 158 Fed. 788.

[116] In re Gay, 188 Fed. 392.

the wages were earned more than three months before the commencement of the proceedings, it is not entitled to priority,[117] and the creditor must allege in his statement of claim, or show by proof, that the debt accrued within the period limited,[118] and if only a part of it accrued within that time, then he is entitled to priority only as to that part.[119] But a creditor having a claim for wages much exceeding the statutory limit of $300, and running back to a time much more than three months prior to the bankruptcy, and who receives payments on account at various times, is not required to credit payments within the last three months so as to reduce wages earned within that period, but is entitled to credit all the payments to the earlier items of the account, leaving $300 earned within the last three months, for which he is entitled to a preference.[120] Wages earned in the interval between the filing of the petition and the adjudication are not within the protection of the statute,[121] but where a laborer is continued in his employment by the receiver in bankruptcy, who carries on the business for a time, his wages earned under the receivership will be given priority.[122] Primarily, however, the statute relates to wages which are owing at the time of the bankruptcy, although they may not be then "due" in the sense of being immediately payable, and which have accrued within three months. It was not the purpose of this clause to make a distinction between wages due which have been earned and wages due which have not been earned, or to determine the wage earner's right by an inquiry into the amount of work done during the period of employment. The purpose is merely to limit priority to wages which have accrued within three months. The fact that during the three months, clerks of the bankrupt were given vacations with pay, such pay to be withheld until the end of the year, during which time the employer became bankrupt does not deprive the clerks of the right to priority for such pay.[123] Finally, wages of workmen, clerks, or servants which have been earned more than three months before the commencement of the proceedings in bankruptcy are not entitled to priority merely because the law of the particular state may grant priority to such claims for a longer period or without any limitation as to the time of their accrual. For this clause of the bankruptcy act is entirely distinct from that which relates to persons entitled to priority under the laws of the state, deals exclusively with the matter to which it relates, and is not enlarged or in any way affected by the later clause.[124]

[117] In re Huntenberg, 153 Fed. 768, 18 Am. Bankr. Rep. 697.

[118] In re Dunn. 181 Fed. 701, 25 Am. Bankr. Rep. 103.

[119] In re Burton Bros. Mfg. Co., 134 Fed. 157, 14 Am. Bankr. Rep. 218.

[120] In re Van Wert Mach. Co., 186 Fed. 607, 26 Am. Bankr. Rep. 597.

[121] In re Waties, 39 Fed. 264.

[122] In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689.

[123] In re B. H. Gladding Co., 120 Fed. 709, 9 Am. Bankr. Rep. 700.

[124] In re Slomka, 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635; In re Rouse, Hazard & Co., 91 Fed. 96, 33 C.

§ 629. Same; Advance of Money to Pay Labor Claims.—The provision of the bankruptcy act giving priority to the claims of workmen, clerks, and servants is for the benefit of the wage earner alone, and does not entitle a third person to priority, on the principle of subrogation or otherwise, who has advanced to the bankrupt money with which to pay the wages of his operatives or servants and which has been used for that purpose.[125] Thus, in one of the cases it appeared that a bankrupt corporation gave to its employés orders on a third person for goods and charged the same against the current wages of the men. The third person filled such orders and charged the amount to the corporation, which paid the same from time to time, either in cash or by note or credit on its books. Under the local statute, the employés were entitled to laborers' liens on the property of the corporation for wages earned within three months prior to the bankruptcy. It was held that no right of subrogation to such liens arose in favor of the claimant, the third person mentioned, from such transactions, nor any right to the priority given to labor claims by the bankruptcy act, and that such subrogation would not be accorded them where it appeared that, if it were, the estate would not be sufficient to pay the preferred claims in full.[126] But under the law of Massachusetts, laborers working on a state building have an equitable lien on funds remaining in the hands of the state's officers, which is superior to any interest of the contractor's trustee in bankruptcy.[127]

§ 630. Claims of United States.—There is some doubt whether claims of the United States government against a bankrupt would be entitled to priority of payment under the description of "debts owing to any person who by the laws of the states or the United States is entitled to priority," as it is not altogether clear that it was meant to include the United States as a "person."[128] But at any rate, this provision is in pari materia with earlier acts of Congress, now embodied in the Revised Statutes,[129] providing for priority of debts due to the United

C. A. 356, 1 Am. Bankr. Rep. 234; In re Marshall Paper Co., 1 Nat. Bankr. News, 294; In re Union Planing Mill Co., 2 Nat. Bankr. News, 384. But compare In re Lawler, 110 Fed. 135, 6 Am. Bankr. Rep. 184.

[125] Bell v. Arledge, 192 Fed. 837, 113 C. C. A. 161, 27 Am. Bankr. Rep. 773; United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; In re St. Louis Ice Mfg. & Storage Co., 147 Fed. 752, 17 Am. Bankr. Rep. 194; In re North Carolina Car Co., 127 Fed. 178, 11 Am. Bankr. Rep. 488; In re Paulson, Fed. Cas. No. 10,849.

[126] J. P. Browder & Co. v. Hill, 136 Fed. 821, 69 C. C. A. 499, 14 Am. Bankr. Rep. 619.

[127] Burr v. Commonwealth, 212 Mass. 534, 99 N. E. 323.

[128] See Beaston v. Farmers' Bank of Delaware, 12 Pet. 102, 9 L. Ed. 1017; Title Guaranty & Surety Co. v. Guarantee Title & Trust Co., 174 Fed. 385, 98 C. C. A. 603, 23 Am. Bankr. Rep. 340.

[129] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the excutors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied;

States in cases of insolvency and requiring every assignee or other person first to pay the debts of the United States.[130] And under former bankruptcy acts it was held that the general government, not being specifically named in such statutes, was not bound by them, and therefore was not compelled to proceed against a bankrupt debtor under and in accordance with such acts, but was entitled to an allowance of its full claim out of the estate in bankruptcy, without regard to the rights of other creditors.[131] But the Supreme Court has held that this right of priority in favor of the United States no longer exists under the bankruptcy act of 1898, so far as regards labor claims, but that, since the section of the act relating to priority claims not only specifies such claims but also prescribes the order of their payment, and since, in that enumerated order, labor claims are named before "debts entitled to priority under the laws of the United States," it follows that labor claims must be paid in full before payment of any debt due to the United States, except for taxes.[132] Presumably the same doctrine should be applied to the other classes of claims accorded priority by the statute, such as the costs and expenses of administration, including the compensation of trustees, referees, and receivers, and these items should be paid in full before the claims of the United States.[133]

But after these preferred claims have been satisfied, or in cases where the costs and expenses of administration have been paid and no labor claims exist, the contest will be between the United States and the general creditors of the estate; and there is no reason why the provisions of the Revised Statutes should not here apply. In such cases it is said that the priority of the United States extends to all classes of debts and to all the debtor's estate which comes to the hands of his assignee or trustee. The latter becomes a trustee for the United States and where he has notice of the debt due to the government, he cannot escape personal liability for the amount of it, to the extent of the value

and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." Rev. Stat. U. S. §§ 3466, 3467.

[130] In re Stoever, 127 Fed. 394, 11 Am. Bankr. Rep. 345; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513.

[131] In re Huddell, 47 Fed. 206; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; Mott v. Maris, 2 Wash. C. C. 196, Fed. Cas. No. 9,880; United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304.

[132] Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873.

[133] See, as to taxes, In re Jacobson (C. C. A.) 263 Fed. 883, 45 Am. Bankr. Rep. 1.

of the assets coming to his hands, if he fails to provide for it before making distribution to other creditors. And even the judgment of a court of competent jurisdiction, directing such distribution, will afford the trustee no justification, in such a case, where it does not appear that the United States was made a party to the proceeding in which such judgment was rendered. And further, the United States, by omitting to prove its claim in the bankruptcy proceedings until after such distribution is made, does not lose its right to proceed against the trustee personally, as the doctrines of waiver, laches, and estoppel cannot be invoked against the sovereign.[134] A claim founded upon the indorsement of a bill of exchange, of which the government is the holder, is thus entitled to priority,[135] and so is a claim for breach of condition of a bond given under the internal revenue laws,[136] or for a penalty incurred by a violation of those laws.[137] And the government is entitled to priority of payment out of the estate of the bankrupt debtor whether he is principal or surety, or solely or jointly liable with others,[138] and though the debt was contracted by a foreigner in a foreign country.[139] So also, a claim of the United States for customs duties on goods imported by the bankrupt is entitled to priority.[140] And under the Act of Congress placing the railroads under federal control during the war, the twelfth section of which declared that moneys derived from the operation of the railroads should be the property of the United States, unpaid freight charges on shipments made during the period of federal control are federal property, and the claim therefor is entitled to priority in a bankruptcy proceeding.[141] But the United States Shipping Board Emergency Fleet Corporation, incorporated under the general corporation laws of the District of Columbia, is not entitled to priority of payment of a debt due to it from a bankrupt with whom the corporation made a contract as a principal, and not as an agent of the United States Government, on the theory that the debt was one due to the United States, for the claimant having been incorporated as a private corporation, it is not divested of that character by the fact that the Government owns its stock.[141½]

But this right of priority is not in the nature of a lien, but only a preferential right of payment out of the general estate, so that the gov-

[134] United States v. Barnes, 31 Fed. 705.

[135] United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304.

[136] In re Webb, 2 N. B. R. 614, Fed. Cas. No. 17,313.

[137] In re Rosey, 6 Ben. 507, 8 N. B. R. 509, Fed. Cas. No. 12,066.

[138] Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513.

[139] Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104.

[140] In re Rosenthal Bros. (D. C.) 235 Fed. 315, 38 Am. Bankr. Rep. 1.

[141] In re E. J. Hibner Oil Co. (C. C. A.) 264 Fed. 667, 45 Am. Bankr. Rep. 380.

[141½] In re Eastern Shore Shipbuilding Corp. (C. C. A.) 274 Fed. 893.

ernment has no right of preference over the holders of valid liens.[142] It is said, however, that the government is not bound by the general equity rule for marshaling assets, nor by any rule prescribed by the bankruptcy law in conformity thereto, any further than as that rule is founded, in the particular case, on the liens of the several parties inter sese.[143] And hence the government may enforce its right of priority without first exhausting securities which it may hold.[144] And the United States is not bound by the rule for the division of an estate as between partnership and separate creditors; that is, though the claim of the government is against an individual partner, it is entitled to priority of payment out of the partnership funds, and vice versa.[145]

It was held under former bankruptcy statutes that the United States was under no obligation whatever to prove its claim in the bankruptcy proceedings, and that the omission to do so did not affect its right to priority.[146] But it is probably otherwise under the present statute, especially in view of the fact that the section bearing the general title "Proof and allowance of claims" includes the following: "Debts owing to the United States as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." [147]

The principle of subrogation may in some cases entitle a third person to succeed to and claim that right of priority which is given to the United States. This was allowed in a recent case to a surety for the bankrupt on a bond executed to the United States, who had paid a judgment recovered against him on the bond.[148] And the same rule has been applied in a case of a surety who has paid money for a bankrupt in discharge of a customs duty bond,[149] and of one purchasing im-

[142] United States v. Hooe, 3 Cranch, 73, 2 L. Ed. 370; United States v. Mechanics' Bank, Gilp. 51, Fed. Cas. No. 15,756; The Thomas Scattergood, Gilp. 1, Fed. Cas. No. 11,106; United States v. Griswold, 7 Sawy. 296, 8 Fed. 496.

[143] In re Strassburger, 4 Woods, 557, Fed. Cas. No. 13,526.

[144] United States v. Lewis, Fed. Cas. No. 15,595, affirmed 92 U. S. 618, 23 L. Ed. 513.

[145] United States v. Lewis, Fed. Cas. No. 15,595, affirmed 92 U. S. 618, 23 L. Ed. 513; In re Strassburger, 4 Woods, 557, Fed. Cas. No. 13,526.

[146] Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104; In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1,704.

[147] Bankruptcy Act 1898, § 57j.

[148] Title Guaranty & Surety Co. v. Guarantee Title & Trust Co., 174 Fed. 385, 98 C. C. A. 603, 23 Am. Bankr. Rep. 340. This case was reversed on appeal (224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873), but only so far as regards the priority of a claim of this kind over labor claims. See also In re P. McGarry & Son, 240 Fed. 400, 153 C. C. A. 326, 39 Am. Bankr. Rep. 224; United States v. National Surety Co. (C. C. A.) 262 Fed. 62, 44 Am. Bankr. Rep. 525; In re Scofield Co., 215 Fed. 45, 131 C. C. A. 353.

[149] Kerr v. Hamilton, 1 Cranch, C. C.

ported goods, and who was compelled, in order to obtain possession of them, to pay the duties which the importer should have paid,[150] and likewise in favor of an internal revenue officer paying to the government the amount of a dishonored check received by him from a debtor to the government.[151]

§ 631. **Claims of State or Municipality.**—A state is a "person" within the meaning of that provision of the bankruptcy act which gives priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority," and hence is a preferred claimant against a bankrupt if its own laws so provide.[152] And if the insolvency law of the state makes the municipal corporations of the state preferred creditors of an insolvent, a county having a claim against a bankrupt is entitled to priority of payment out of his estate,[153] but not unless some state law so provides.[154] And if the state law regulating assignments for creditors or the administration of insolvents' estates declares that it shall be for the equal and common benefit of all creditors, and supersedes the common-law rule that debts due the crown were entitled to priority as against general creditors, the state itself can claim no priority in bankruptcy proceedings against its debtor.[155] But assuming the state to be entitled to priority, this right will attach to a claim upon a contract for the hire of convict labor,[156] and for the price of goods made in the state prison and sold to the bankrupt, or any other property of the state so sold,[157] and a judgment rendered in favor of the state against a surety on a bail bond given for the appearance of a person under indictment for a crime.[158] But the state has no claim to priority against a bankrupt bank in which the warden of a penitentiary had de-

546, Fed. Cas. No. 7,731. But see Pollock v. Pratt, 2 Wash. C. C. 490, Fed. Cas. No. 11,256.

[150] In re Kirkland, 2 Hughes, 208, 14 N. B. R. 139, Fed. Cas. No. 7,843.

[151] In re McBride, 19 N. B. R. 452, Fed. Cas. No. 8,662. But see Wilkinson v. Babbitt, 4 Dill. 207, Fed. Cas. No. 17,668.

[152] In re Western Implement Co., 166 Fed. 576, 22 Am. Bankr. Rep. 167. The law of Alabama does not give priority to a debt due to the state from an insolvent debtor, or a decedent, except for taxes, and a contract debt due to the state from a bankrupt is therefore not entitled to priority. State of Alabama v. Martin, 256 Fed. 313, 167 C. C. A. 661, 43 Am. Bankr. Rep. 450.

[153] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592.

[154] In re Waller, 142 Fed. 883, 15 Am. Bankr. Rep. 753; In re Manistee Watch Co., 197 Fed. 455, 28 Am. Bankr. Rep. 316.

[155] In re Devlin, 180 Fed. 170, 24 Am. Bankr. Rep. 863.

[156] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Dodge, 4 Dill. 532, Fed. Cas. No. 3,949; In re Southwestern Car Co., 9 Biss. 76, 19 N. B. R. 404, Fed. Cas. No. 13,192.

[157] In re Mercer, 171 Fed. 81, 96 C. C. A. 185, 22 Am. Bankr. Rep. 413; In re Mellor, 10 Ben. 58, 17 N. B. R. 402, Fed. Cas. No. 9,401.

[158] In re Chamberlin, 9 Ben. 149, 17 N. B. R. 49, Fed. Cas. No. 2,580.

posited funds in his own name, as he is liable to the state on his bond.[159] It should also be observed that this preferential right of a state or its municipalities is subject to the provision of the bankruptcy act that "debts owing to the United States, a state, a county, a district, or a municipality, as a penalty or forfeiture, shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." [160]

§ 632. Claims Entitled to Priority Under State Laws.—While a state law could not, of its own force, grant or determine priorities of payment in the distribution of a bankrupt's estate, yet that clause of the national bankruptcy law which accords priority to "debts owing to any person who, by the laws of the states or the United States, is entitled to priority" adopts the law of the state for this purpose and makes it applicable as federal law in determining the question of priorities.[161] And the controlling principle is that the creditor shall be allowed the same priority under the bankruptcy act as he would have had under the state law governing the distribution of the estates of insolvent debtors, if that law had not been superseded by the bankruptcy act.[162] For a state insolvency law, though its operation upon insolvents is suspended while the national bankruptcy law is in force, still remains a "law of the state" within the meaning of this clause.[163] And a creditor may claim a right of priority in payment which the law of the state gives him, though he does not set up such claim until more than a year after the adjudication in bankruptcy, when the question of the distribution of assets first arises.[164] But this provision does not operate to place all preferred debts of this class upon a plane of equality; but liens created by the laws of the state will attach to the property of a bankrupt in the hands

[159] In re Corn Exchange Bank, 7 Biss. 400, 15 N. B. R. 431, Fed. Cas. No. 3,242.

[160] Bankruptcy Act 1898, § 57j.

[161] Central Trust Co. of Illinois v. George Lueders & Co., 221 Fed. 829, 137 C. C. A. 387, 34 Am. Bankr. Rep. 61; In re Bennett, 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 320, 847; And see In re Leflys, 229 Fed. 695, 144 C. C. A. 105, 36 Am. Bankr. Rep. 306; McDermott v. Tolt Land Co., 101 Wash. 114, 172 Pac. 207; In re New Galt House Co. (D. C.) 199 Fed. 533; Bean v. Orr, 182 Fed. 599, 105 C. C. A. 137, 25 Am. Bankr. Rep. 400; In re Bazemore (D. C.) 189 Fed. 236, 26 Am. Bankr. Rep. 494. In this clause of the Bankruptcy Act, the word "state" is broad enough to include Porto Rico, so that a person who is entitled to priority under the laws of Porto Rico is entitled to priority in bankruptcy. In re Vidal, 233 Fed. 733, 147 C. C. A. 499, 36 Am. Bankr. Rep. 783. Compare Gandia & Stubbe v. Cadierno, 233 Fed. 739, 147 C. C. A. 505, 36 Am. Bankr. Rep. 789.

[162] In re Jones, 151 Fed. 108, 18 Am. Bankr. Rep. 206.

[163] In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592.

[164] In re Ashland Steel Co., 168 Fed. 679, 94 C. C. A. 165, 21 Am. Bankr. Rep. 834.

of his trustee in the same relative rank and order in which they are fixed by the state statutes.[165] As an example of a priority right given by state law, we may cite the case of a statute providing that persons who shall have furnished materials or supplies for the carrying on of the business of any manufacturing company shall have a lien on its property and effects involved in the business, superior to any mortgage or other incumbrance thereon.[166] So the laws of some states give a preferential right of payment to the holders of mechanics' liens, and this will be recognized and enforced in bankruptcy.[167] And where the civil law prevails, community property is primarily a fund for the payment of community debts, and will be so applied in bankruptcy, the law postponing the claim of an antenuptial creditor.[168] In some states also, the statutes give a preference to debts due from an insolvent person in the character of a guardian, to his ward, which will furnish the rule for distribution in bankruptcy.[169] And if the local law gives priority to the legal costs and expenses of an attachment suit against an insolvent, as is the case in several states, such items will be accorded a like priority in bankruptcy proceedings.[170] But the right of antecedent creditors, under the laws of the particular state, to set aside a conveyance made by their debtor without consideration, as being in fraud of their claims, but which, by the same law, is valid as to subsequent creditors or purchasers, is not a debt which is given priority by the state law so as to be entitled to priority in bankruptcy.[171]

§ 633. **Landlord's Claim for Rent.**—In several states, the local law gives priority of payment to the claim of a landlord for rent due and unpaid, in case of the insolvency of the tenant or where an execution is levied on his goods, usually, however, with the limitation that such claim is enforceable only against leviable or distrainable property on the demised premises, and only for rent accrued within a limited period, as, one year. Such a law will be applicable in bankruptcy proceedings

[165] In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437.

[166] In re Bennett, 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847. And see In re Rheinstrom & Sons Co. (D. C.) 207 Fed. 119; Louisville Woolen Mills Co. v. Johnson. 228 Fed. 606. 143 C. C. A. 128, 37 Am. Bankr. Rep. 67.

[167] In re Clark Coal & Coke Co., 173 Fed. 658, 23 Am. Bankr. Rep. 273. See In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Fowble (D. C.) 213 Fed. 676; Interstate Contracting & Supply Co. v. Belleville Sav. Bank, 197 Ill. App. 30.

[168] In re Chavez (C. C. A.) 149 Fed. 73, 17 Am. Bankr. Rep. 641.

[169] In re Crow, 116 Fed. 110, 7 Am. Bankr. Rep. 545. Compare In re Jones, 151 Fed. 108, 18 Am. Bankr. Rep. 206.

[170] In re Amoratis, 178 Fed. 919, 102 C. C. A. 297; In re Iroquois Mach. Co., 166 Fed. 629, 22 Am. Bankr. Rep. 183; In re Goldberg & Bros., 144 Fed. 566; In re Lewis, 99 Fed. 935, 4 Am. Bankr. Rep. 51. But compare In re The Copper King, 143 Fed. 649, 16 Am. Bankr. Rep. 148.

[171] Globe Bank & Trust Co. of Paducah v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162.

against the tenant, and the lessor will be entitled to claim the priority which the local law gives him.[172] And he is not required to bring an action in a state court for the establishment of his lien, or to levy on the property, but may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority,[173] unless the local statute requires him to levy a distress as a condition precedent to claiming a lien.[174] But where the landlord permits the receiver or trustee in bankruptcy to make a sale in bulk of the entire equipment of the bankrupt's business, including some assets which would be subject to his claim for rent and some which would not, making no objection and interposing no claim, he cannot ask the court to apportion the proceeds of the sale so as to give him priority of payment out of any part of the fund.[175] And where the state law limits the right of priority to such rent as may be due for not more than one year last past, the landlord cannot gain a preferred right to more than a year's rent by distraining on the property after the adjudication in bankruptcy, though before the appointment of a trustee.[176] Further, it is the generally accepted doctrine that priority can be given only to such rent as is past due at the date of the adjudication, which fixes the rights of priority creditors as well as others, so that the landlord can gain no advantage from a provision in the lease (or even in the state statute) that the rent for the entire unexpired portion of the term shall become due and payable upon the bankruptcy of the tenant.[177] But where the bankrupt occupied a part of the

[172] Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451; In re Bayley, 177 Fed. 522, 22 Am. Bankr. Rep. 249; In re Burns, 175 Fed. 633, 23 Am. Bankr. Rep. 640; In re V. D. L. Co., 175 Fed. 635, 23 Am. Bankr. Rep. 643; In re West Side Paper Co., 159 Fed. 241, 20 Am. Bankr. Rep. 289; In re Morris, 159 Fed. 591, 19 Am. Bankr. Rep. 781; In re Bishop, 153 Fed. 304, 18 Am. Bankr. Rep. 635; In re Renda, 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re Grovenstein-Bishop Co. (D. C.) 223 Fed. 878, 35 Am. Bankr. Rep. 114; In re Mt. Winans Lumber Co. (D. C.) 228 Fed. 831, 36 Am. Bankr. Rep. 263. A debt for rent stands like any other debt before the court of bankruptcy, without preference or priority, unless made preferential by some state or federal law. Slayton v. Drown, 93 Vt. 290, 107 Atl. 307.

[173] In re Byrne (D. C.) 97 Fed. 762, 3 Am. Bankr. Rep. 268; In re Pittsburg Drug Co. (D. C.) 164 Fed. 482, 20 Am. Bankr. Rep. 227.

[174] In re Chaudron & Peyton, 180 Fed. 841, 24 Am. Bankr. Rep. 811; In re Southern Co. of Baltimore City, 180 Fed. 838; In re Gerrow (D. C.) 233 Fed. 845, 37 Am. Bankr. Rep. 14. See In re Braus (D. C.) 233 Fed. 835, 37 Am. Bankr. Rep. 594; In re Cole Jewelry Co. (D. C.) 243 Fed. 790, 40 Am. Bankr. Rep. 234.

[175] In re McFadgen, 156 Fed. 715, 19 Am. Bankr. Rep. 481. And see Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480. But see, as to a sale made without notice to the landlord, In re Federal Biscuit Co., 218 Fed. 753, 134 C. C. A. 431, 33 Am. Bankr. Rep. 273.

[176] In re Duble, 117 Fed. 794, 9 Am. Bankr. Rep. 121.

[177] In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590; Wilson v. Pennsylvania Trust Co., 114 Fed. 742, 52 C. C. A. 374, 8 Am. Bankr. Rep. 169; In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Winfield Mfg. Co., 149 Fed. 185, 15 Am. Bankr. Rep. 257. Compare In re Keith-Gara Co., 203 Fed. 585, 29 Am. Bankr. Rep. 466, affirmed in Ludlow v. Pugh, 213 Fed. 450, 130 C.

leased premises as a storeroom, and the remainder for living quarters, the landlord will have a preferred claim on the goods in the storeroom for the amount due as rent for the entire premises.[178] But these laws are applied with a reasonable measure of strictness. And if the statute gives the landlord a preferential claim on goods and chattels of the tenant "liable to distress," he cannot claim priority of payment out of the proceeds of the bankrupt's liquor license sold by the trustee.[179] And the claim will be restricted to rent properly so called, and will not be allowed to include the amount of an unpaid city water tax,[180] or a sum which the landlord was compelled to pay to discharge a lien for repairs made by the municipal health department.[181] And the bankruptcy law does not entitle a landlord's claim to priority over all other claims whatever, but only over those not specified in the bankruptcy act as being higher in rank or right.[182] But where there was an agreement between the bankrupt and his landlord that the counter indebtedness of the landlord to the bankrupt should be applied, as it arose, to indebtedness of the bankrupt to the landlord other than rent, it will be so applied in the bankruptcy proceedings, although the result will be to create a claim for rent, entitled to priority, larger than would otherwise be the case.[183] Where the receiver or the trustee in bankruptcy continues to occupy the premises leased by the bankrupt, the rent for the period of such occupation is payable as part of the cost of administration, and is treated as a priority debt to that extent.[184]

§ 634. **Trust Creditors and Claimants of Trust Funds.**—The right of a creditor to recover or reclaim property of his which was held by the bankrupt in trust for him, or to receive payment in full out of trust funds in the hands of the trustee in bankruptcy, does not depend upon the insolvency laws of the states or laws giving priority to favored claims.[185] In fact, it is not a question of priority at all, but of the right of the owner of property or money to reclaim it. A trust creditor of a bankrupt is not entitled to any preference over the general creditors

C. A. 96. And see In re Quality Shoe Shop (D. C.) 212 Fed. 321, 34 Am. Bankr. Rep. 196.

178 In re Hersey, 171 Fed. 1001, 22 Am. Bankr. Rep. 860.

179 In re Myers, 102 Fed. 869, 4 Am. Bankr. Rep. 536.

180 In re Family Laundry Co., 193 Fed. 297, 27 Am. Bankr. Rep. 517. As to taxes in general, see In re Spies-Alpher Co. (D. C.) 231 Fed. 535, 36 Am. Bankr. Rep. 470; In re William A. Harris Steam Engine Co. (D. C.) 225 Fed. 609, 34 Am. Bankr. Rep. 835.

181 In re Schomacker Piano Forte Mfg. Co., 163 Fed. 413, 20 Am. Bankr. Rep. 899.

182 In re Consumers' Coffee Co., 151 Fed. 933, 18 Am. Bankr. Rep. 500.

183 In re Bell Engraving Co. (D. C.) 214 Fed. 510.

184 In re Mullings Clothing Co. (D. C.) 230 Fed. 681, 37 Am. Bankr. Rep. 166. And see, supra, §§ 211, 307, 522.

185 Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863.

merely because of the character of his claim. But he is entitled to satisfaction of his claim if he can show that the trust fund, or property into which it was converted, came into the hands of the trustee in bankruptcy and increased the assets of the estate, even though the property cannot be exactly identified.[186] But first, the trust must be distinctly established, and a contract or transaction which merely creates the relation of debtor and creditor between the parties, without impressing a trust on any fund or property, will not be sufficient to support a claim to payment in full.[187] But subject to this condition, the general rule may apply to special deposits in a bank or trust company.[188] And where a bankrupt concealed money from his trustee, with which he purchased a stock of merchandise and conducted business in the name of another, debts contracted in the name of such other in the course of the business are entitled to priority of payment from the proceeds of the property.[189] And so, the payment of a dividend, by the receiver of a state court appointed for an insolvent partnership in a suit by one partner for dissolution, to such creditors as presented their claims, within four months prior to the bankruptcy of the partnership, operates as a voidable preference as against other creditors, who were without notice and did not participate, and entitles them, on proving their claims in bankruptcy, to payment of an equal percentage thereon before any further dividends are paid.[190]

[186] Cox v. New England Equitable Ins. Co., 247 Fed. 955, 160 C. C. A. 655, 40 Am. Bankr. Rep. 793; Zenor v. McFarland, 238 Fed. 721, 151 C. C. A. 571, 38 Am. Bankr. Rep. 510; Johnson v. Bixby, 252 Fed. 103, 164 C. C. A. 215, 1 A. L. R. 660, 42 Am. Bankr. Rep. 396; In re Stringer (D. C.) 230 Fed. 177, 37 Am. Bankr. Rep. 44; In re Hawley Down Draft Furnace Co. (D. C.) 256 Fed. 555, 43 Am. Bankr. Rep. 338; In re Brunsing, Tolle & Postel, 169 Fed. 668, 22 Am. Bankr. Rep. 129; In re J. M. Acheson Co., 170 Fed. 427, 95 C. C. A. 597, 22 Am. Bankr. Rep. 338; In re Smith, Thorndyke & Brown Co., 159 Fed. 268, 20 Am. Bankr. Rep. 312; Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863; In re North Carolina Car Co., 127 Fed. 178, 11 Am. Bankr. Rep. 488; John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422; In re Tracy, 185 Fed. 844; In re Gaskill, 130 Fed. 235, 12 Am. Bankr. Rep. 251. For the rule that trust funds held by the bankrupt are not assets of his estate, and concerning the remedies of trust creditors, see supra, § 354. That the restoration of trust funds or property held in trust is not the giving of a preference, see supra, § 582.

[187] In re Meyer (D. C.) 106 Fed. 828, 5 Am. Bankr. Rep. 596; Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863; Block v. Shaw, 78 Ark. 511, 95 S. W. 806. Where a bankrupt, at the time of purchasing certain materials from the claimant on cash terms, intended to pay promptly, and reasonably expected to be able to do so, the seller was not entitled to a preference on the theory that the purchase was fraudulent. Cincinnati Ry. Supply Co. v. Hartlieb, 214 Fed. 177, 130 C. C. A. 525.

[188] Riley v. Pope, 186 Fed. 857, 26 Am. Bankr. Rep. 618; In re Smart, 136 Fed. 974, 14 Am. Bankr. Rep. 672; Binghampton Trust Co. v. Gregory, 148 App. Div. 520, 132 N. Y. Supp. 950; In re Smith, Thorndyke & Brown Co., 170 Fed. 900, 96 C. C. A. 76, 22 Am. Bankr Rep. 350. And see supra, § 355.

[189] In re Offricht (D. C.) 260 Fed. 682, 43 Am. Bankr. Rep. 345.

[190] Farnsworth v. Union Trust & Deposit Co. (C. C. A.) 272 Fed. 92, 46 Am. Bankr. Rep. 447.

CHAPTER XXXI

DIVIDENDS

§ 635. Meaning of "Dividend" in Bankruptcy.—A "dividend" is the distributive share payable to a creditor out of an estate in bankruptcy or insolvency. But the word has a somewhat more restricted meaning as used in that section of the bankruptcy act which provides that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."[1] Here the term is held to apply only to payments made on the claims of the general and unsecured creditors, and not to disbursements by the trustee in discharge of taxes, claims entitled to priority, or valid liens, and not to the claims of secured creditors at all, except in so far as the amount of the claim may exceed the value of the security.[2] Upon the filing of a petition in bankruptcy, "there vests in each creditor as a cestui que trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate,"[3] or rather, perhaps, there vests in the creditor an undivided interest in the estate, measured by the ratio between the amount of his claim and the entire amount of claims, and when this interest is ascertained and is satisfied by the act of the trustee in paying to the creditor, in one or more payments, as the law directs, the sum to which he is entitled proportionally with other cred-

[1] Bankruptcy Act 1898, § 65a. Although the fund for distribution was raised by a sale of the entire assets of the bankrupt, under the sanction of the court, to a purchaser whose offer was to pay priority and preferred claims in full and 20 per cent. on the claims of unsecured creditors, still the dividend of 20 per cent. can be declared and paid only to those creditors whose claims have been duly filed and allowed. In re Schloss (D. C.) 257 Fed. 876, 44 Am. Bankr. Rep. 64.

[2] Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122; In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Hinckel Brewing Co., 124 Fed. 702, 10 Am. Bankr. Rep. 692; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651; In re Gardner, 103 Fed. 922, 4 Am. Bankr. Rep. 420; In re Ft. Wayne Electric Corp., 94 Fed. 109, 1 Am. Bankr. Rep. 706. Compare In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306.

[3] Board of County Com'rs of Shawnee County v. Hurley, 169 Fed. 92, 94 C. C. A. 362, 22 Am. Bankr. Rep. 209.

itors of the same class, each of such payments constitutes a "dividend" in bankruptcy. If the creditor's claim is of such a nature as to be barred by the bankrupt's discharge, and if the discharge is granted, the dividends so received will be in full satisfaction of the claim. But if the creditor had an action pending on his claim at the time of the adjudication in bankruptcy, and the debtor fails to obtain a discharge, then dividends in the bankruptcy proceedings received by the plaintiff will merely reduce his cause of action pro tanto.[4]

§ 636. Funds for Distribution as Dividends.—The funds available for dividends in bankruptcy are such as result from the recovery and reduction to cash of the assets of the bankrupt, in so far as the same are subject to the claims of general creditors. These two things must concur; the fund must arise from property of the bankrupt, and it must be distributable to general creditors. Thus, if the bankrupt misappropriated trust funds in his hands, and the money has come into the possession of the trustee, the defrauded cestui que trust may follow and reclaim the fund by appropriate proceedings; but it is on the theory of its being his property and not a part of the estate in bankruptcy.[5] But one acquiescing in an order of the court for the sale of his own property and property of the bankrupt in one lot, and who thereafter prays for preference in payment out of the proceeds of the sale, is estopped from receiving a larger proportion of such proceeds than the ratio which the value of his property bore to the value of the lot sold at the time of the sale.[6] Money contributed by relatives and friends of the bankrupt, to increase his estate, under an agreement with creditors, may constitute a fund for dividends, but not where its payment was induced by a bargain which was contrary to law or to public policy, such as an agreement not to prosecute the bankrupt criminally.[7] Where property incumbered with a valid lien is sold, and more is realized than is required to satisfy the lien, the surplus will be available for creditors. But if the bankrupt had a right to compel contribution from a person jointly interested with him in the property, the claim of creditors to be subrogated to this right can only be considered and determined in ancillary proceedings instituted for that purpose.[8]

Where property or its value is recovered by the trustee in bankruptcy by means of a suit to vacate a fraudulent conveyance or a voidable preference, or to dissolve attachment or other liens which are not pre-

[4] American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583.

[5] In re Wilkes-Barre Furniture Mfg. Co., 130 Fed. 796, 12 Am. Bankr. Rep. 472.

[6] In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259.

[7] In re Rosenblatt, 153 Fed. 335, 18 Am. Bankr. Rep. 663.

[8] In re Straub, 158 Fed. 875, 19 Am. Bankr. Rep. 808.

served in bankruptcy, the proceeds constitute a fund available for dividends, that is, for distribution among all the general creditors proportionally, and are not for the benefit of those alone who began an attack on the fraudulent transaction or who held provable claims at that time.[9]

In partnership cases, the fund primarily available for dividends to the firm creditors will arise only out of partnership assets, while that available for the individual creditors will be produced from the separate estates of the partners.[10] But where a person buys up claims against a bankrupt partnership, and agrees to pay any amount in excess of five per cent. of the claims received from the estate of the partnership, a dividend on the partnership claims is received from the bankrupt estate of the partnership, though the funds therefor were derived from the estate in bankruptcy of one of the partners, and though the assets of that partner were not formally transferred to the assets of the firm estate; for the only way in which a firm creditor could share in the surplus of a partner's estate is by its transfer, actual or constructive, to the partnership estate, and hence a constructive transfer by operation of law must be held to have been made.[11]

Claims in bankruptcy may be postponed, or made subordinate in the distribution of dividends to the claims of all other creditors or of certain classes of creditors, when such was the agreement of the parties, or on principles of estoppel or as the result of fraudulent conduct making it inequitable that such claims should share equally with others.[12] This rule may be applied, for instance, where a mortgage has been purposely or fraudulently withheld from record.[13]

§ 637. Time for Declaration of Dividends.—On this point the provision of the statute is as follows: "The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in

[9] In re Martin, 193 Fed. 841, 113 C. C. A. 627, 27 Am. Bankr. Rep. 545; In re Kohler, 159 Fed. 871, 87 C. C. A. 51, 20 Am. Bankr. Rep. 89; Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957. A creditor who surrenders a preference which he has received and thereafter files and proves his claim as a general unsecured claim is entitled to share in the dividend, and is not postponed to creditors as to whom the preference was originally voidable. L. A. Becker Co. v. Gill, 206 Fed. 36, 124 C. C. A. 170, 30 Am. Bankr. Rep. 429. See Wells v. Lincoln, 214 Fed. 227, 130 C. C. A. 641, 32 Am. Bankr. Rep. 620.

[10] Bankruptcy Act 1898, § 5f.

[11] Frame v. Attermeier, 147 Wis. 485, 133 N. W. 603.

[12] See In re Cloverdale Creamery Co., 249 Fed. 194, 161 C. C. A. 230, 41 Am. Bankr. Rep. 643; In re Wenatchee Heights Orchard Co. (D. C.) 209 Fed. 84, 31 Am. Bankr. Rep. 550; In re George C. Bruns Co., 256 Fed. 840, 168 C. C. A. 186, 43 Am. Bankr. Rep. 282; Edgar v. Ames, 255 Fed. 835, 167 C. C. A. 163, 42 Am. Bankr. Rep. 697; Courtney v. Croxton, 239 Fed. 247, 152 C. C. A. 235, 38 Am. Bankr. Rep. 560.

[13] See Hicks v. Second Nat. Bank, 224 Fed. 53, 139 C. C. A. 615; Hollenbeck v. Louden, 35 S. Dak. 320, 152 N. W. 116; Martin v. Commercial Nat. Bank of Macon, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; Fourth Nat. Bank v. Willingham, 213 Fed. 219, 129 C. C. A. 563, 32 Am. Bankr. Rep. 159.

excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed, equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more, and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared."[14] When all the known assets of the bankrupt have been collected and reduced to money, and the estate is ready to be closed, a final dividend may be declared at any time after the expiration of three months from the declaration of the first dividend.[15] And this may be done notwithstanding the fact that the period of one year from the date of the adjudication, within which time creditors may prove their claims, has not yet expired, and creditors proving thereafter will only be entitled to subsequently discovered assets and unclaimed dividends.[16]

§ 638. Proceedings for Declaration and Payment of Dividends.— Dividends are to be declared by the referee, and it is also made his duty to furnish to the trustee a dividend sheet showing the dividend declared and to whom payable.[17] And creditors must have the statutory ten days' notice by mail of the declaration and time of payment of all dividends.[18] But the declaration and payment of a dividend may be stayed by the court, when a motion is pending to expunge certain claims, the allowance or disallowance of which will materially affect the result and the amount of the shares of other creditors.[19] The distribution of the bankrupt's estate is strictly governed by these provisions of the statute,[20] and it is irregular and unsafe to proceed in any other manner or to neglect anything which the act requires to be done. Thus, for example, an order entered by consent of all known creditors, in proceedings against an insolvent corporation, for the settlement of the estate and distribution

[14] Bankruptcy Act 1898, § 65b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[15] In re Bell Piano Co., 155 Fed. 272, 18 Am. Bankr. Rep. 183; In re Eldred, 155 Fed. 686, 19 Am. Bankr. Rep. 52; In re Mills, 7 Ben. 452, 11 N. B. R. 117, Fed. Cas. No. 9,610.

[16] In re Stein, 94 Fed. 124, 1 Am. Bankr. Rep. 662.

[17] Bankruptcy Act 1898, § 39a. But if it is proposed to declare dividends oftener or in smaller proportions than the act directs, the power to do this is given to the "judge" only. Id., § 65b. And this word, as used in the act, does not include the referee. Id., § 1, cl. 16.

[18] Bankruptcy Act 1898, § 58a (5).

[19] In re Jaycox, 7 N. B. R. 303, Fed. Cas. No. 7,240.

[20] In re York Silk Mfg. Co., 188 Fed. 735, 26 Am. Bankr. Rep. 650.

of the proceeds as therein provided, but not in accordance with any express provision of the bankruptcy act, must be held subject to the rights of any unknown creditors who may appear within the time allowed by law and present their claims.[21] So where a trustee in bankruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate, but without any order or warrant of the referee or the court so to do, and the court afterwards determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still in the hands of the trustee, and he will be required to satisfy the claim of the attorney.[22]

The statute requires that dividends shall be of an "equal per centum," which means that each of the creditors entitled to participate in the dividend shall receive a percentage of his total claim equal to the percentage awarded to all the other participating creditors.[23] But this does not prevent the court from exercising its equitable powers in deciding who shall be entitled to participate in the dividend, or to what extent his claim shall be allowed.[24] Thus, it is competent to postpone the claim of one creditor to that of another, when the fraudulent conduct of the one, as compared with the innocence and good faith of the other, demands that such a course should be taken.[25] But an alleged indebtedness from one creditor of the bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, cannot be litigated in such proceedings or adjusted in the distribution of dividends.[26] But the trustee in bankruptcy cannot be permitted to make a profit out of his trust; and where he has purchased a claim against the estate for less than its face value, dividends will be allowed thereon only to the extent of the amount he actually paid for it, with interest, and even though he has transferred the claim to another.[27]

§ 639. Reopening and Setting Aside Order.—A motion to reopen or vacate an order for a dividend may be made by any person interested, on proper papers and notice, and on the showing of a sufficient

[21] In re Lockwood, 104 Fed. 794, 4 Am. Bankr. Rep. 731.

[22] In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

[23] The rate of the dividend to be distributed among the creditors depends upon the amount of the proved claims, the amount of the assets, and the fixing of the rate of distribution by the court of bankruptcy. Bausman v. Mead, 182 Ill. App. 35.

[24] See Searle v. Mechanics' Loan & Trust Co., 249 Fed. 942, 162 C. C. A. 140, 41 Am. Bankr. Rep. 786.

[25] In re Paris Modes Co., 196 Fed. 357, 116 C. C. A. 177, 28 Am. Bankr. Rep. 470; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273. That one creditor of a bankrupt had orally promised another creditor of the same class that his claim should be paid does not estop the former from receiving dividends equally with the latter. Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658, 40 Am. Bankr. Rep. 311.

[26] In re Girard Glazed Kid Co., 136 Fed. 511, 14 Am. Bankr. Rep. 485.

[27] In re Sweetser, 157 Fed. 567.

case, the referee and trustee will be forbidden to take steps for the payment of the dividend until the further orders of the court.[28] But it must be remembered that an order for a dividend, when made pursuant to proper notice and filed in court, becomes virtually a judgment of the court, and cannot be disturbed except for some error committed by the referee and apparent from his memoranda and papers on file in the case.[29] And after a dividend has been not only declared but actually paid out to the creditors entitled, it cannot be set aside, notwithstanding the fact that it was erroneously made so large as not to leave sufficient money in the trustee's hands for an equal dividend to creditors afterwards perfecting their proofs, in addition to the costs of administration.[30] The correctness of an order declaring a dividend is to be determined with reference to the time when it was made, and if it was proper at that time, the subsequent filing of further claims does not afford ground for subjecting it to review. So the question whether an order declaring a dividend, which was right when made, shall be revoked because of the subsequent filing of a new and large claim, is a matter within the discretion of the referee, the exercise of which is not reviewable, except so far as it may proceed on erroneous principles of law.[31]

§ 640. **Payment of Dividends.**—Dividends are required to be paid by the trustee in bankruptcy within ten days after they are declared by the referee,[32] and trustees may "disburse money only by check or draft on the depositories in which it has been deposited."[33] Checks issued by a trustee in payment of dividends, if made payable to attorneys, should designate them as such, and they must also, in compliance with the rules, state the account on which they are drawn, to constitute proper vouchers corresponding with the dividend sheet. Checks payable to persons whose names do not appear on the dividend sheet, or which do not show what claims are covered thereby, or the authority of the payee to receive them, will not be approved as proper vouchers.[34] The trustee may withhold the payment of a dividend, if its declaration, so far as regards the particular claim concerned, was unauthorized,[35] or if the creditor is also a debtor to the bankrupt firm or a member of it,

[28] In re New York Mail S. S. Co., 3 N. B. R. 280, Fed. Cas. No. 10,212.

[29] In re Smith, 15 N. B. R. 97, Fed. Cas. No. 12,989.

[30] In re Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324; In re Smith, 15 N. B. R. 97, Fed. Cas. No. 12,989.

[31] In re Henry Siegel Co. (D. C.) 216 Fed. 943.

[32] Bankruptcy Act 1898, § 47a, cl. 9.

[33] Bankruptcy Act 1898, § 47a, cl. 4.

[34] In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635.

[35] In re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6,420.

his dividend check may be withheld until the determination of a suit by the trustee to recover the debt.[36] On the other hand, if the trustee withholds payment of a dividend without a sufficient legal reason, the creditor may have an order requiring him to pay it,[37] and any court of general jurisdiction, including a state court, has jurisdiction of an action against the trustee to recover a dividend declared and which the trustee has fraudulently converted to his own use.[38] A dividend declared but unpaid may be assigned, and the assignee may take the like steps to enforce its payment.[39] But a dividend declared and due to a particular creditor, but not yet paid to him, cannot be attached or garnished in the hands of the trustee.[40] But a creditor of the creditor, claiming a specific lien on the fund, may assert his rights in the court of bankruptcy, or if he has a suit pending in a state court, that court may appoint a receiver who will represent him in the bankruptcy proceeding and receive the money coming to the defendant as a dividend, and then account to the court appointing him for the same.[41]

§ 641. Recovery of Dividends Paid on Rejected Claims.—Where a dividend has been paid on an allowed claim, and afterwards the claim is reconsidered and rejected, in whole or in part, the trustee may recover from the creditor the amount of the dividend so paid or a proportional part.[42] For the purposes of such recovery a plenary suit is not necessary, at least where the creditor has contested the reconsideration and rejection of his claim, as he thereby submits himself to the jurisdiction of the bankruptcy court, and in such a case it may simply make an order requiring him to pay to the trustee in bankruptcy a designated amount.[43] And prior to a direct or indirect order of allowance of a claim, it is not necessary for the trustee to move for a reconsideration of the claim, as the statute directs, in order to recover dividends paid.[44]

On similar principles, where the claim of the creditor is based on a

[36] Atkinson v. Kellogg, 10 N. B. R. 535, Fed. Cas. No. 613.

[37] In re Augusta Pottery Co., 163 Fed. 1011, 21 Am. Bankr. Rep. 64.

[38] Berford v. Barnes, 45 Hun (N. Y.) 253.

[39] Rockland Sav. Bank v. Alden, 103 Me. 230, 68 Atl. 863, 14 L. R. A. (N. S.) 1220, 13 Ann. Cas. 806. See Stires v. First Nat. Bank, 83 Neb. 193, 119 N. W. 258.

[40] In re Hollander, 181 Fed. 1019, 25 Am. Bankr. Rep. 48; In re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, 26 Am. Bankr. Rep. 584; Cowart v. W. E. Caldwell Co., 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720; In re Bridgman, 2 N. B. R. 252, Fed. Cas. No. 1,867; Gilbert v. Quimby, 1 Fed. 111; In re Chisholm, 4 Fed. 526; In re American Electric Telephone Co., 211 Fed. 88, 127 C. C. A. 512, 31 Am. Bankr. Rep. 612.

[41] In re Hollander, 181 Fed. 1019, 25 Am. Bankr. Rep. 48; Jackson v. Miller, 9 N. B. R. 143.

[42] Bankruptcy Act 1898, § 57*l*.

[43] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814.

[44] In re Two Rivers Woodenware Co., 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 518.

judgment which he has recovered against the bankrupt in a state court, and it is allowed, and the creditor's dividend paid to him, but afterwards the judgment is reversed on appeal, the trustee may recover the sum so paid as a dividend.[45]

§ 642. **Claims Proved After Dividend.**—"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors, if the estate equals so much, before such other creditors are paid any further dividends."[46] It is probably proper for the trustee, in reporting funds to the referee for the declaration of a dividend, to reserve funds sufficient in amount for a like dividend upon claims which are still under consideration, or which are known to exist and will probably be proved and allowed. But a claim entitled to priority of payment out of such funds as may be on hand when it is presented, does not lose this right merely because it was not presented until after the declaration and payment of a first dividend. And where the trustee reserves money sufficient to pay a like dividend on claims which had previously been disallowed for want of sufficient proof, but with leave to the creditors to amend, the latter have no lien on the money so reserved, nor is the referee bound to distribute it to them; so that if, thereafter, a claim for an attorney's fee is presented, which is entitled to priority of payment as part of the costs of administration, it must be paid out of such reserved fund, in preference to the general creditors.[47] And where all the assets of the estate have been collected and reduced to money and a final dividend declared, any creditor who has not then proved his claim is debarred from participating in the fund,[48] though he may still have his share if any other assets should be discovered later, or if any dividends remain unclaimed.

§ 643. **Interest on Dividends.**—A trustee in bankruptcy is not bound to pay interest upon dividends which may be declared upon debts which have been fairly and reasonably disputed, from the time that like dividends were declared upon undisputed debts.[49] But where the payment

[45] Nelson v. Heckscher, 219 Fed. 679, 135 C. C. A. 351, 33 Am. Bankr. Rep. 514.

[46] Bankruptcy Act 1898, § 65c.

[47] In re Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324.

[48] In re Bell Piano Co., 155 Fed. 272, 18 Am. Bankr. Rep. 183; In re Miller, Fed. Cas. No. 9,556; In re Coulter, 206 Fed. 906, 30 Am. Bankr. Rep. 75.

[49] Hersey v. Fosdick (C. C.) 20 Fed. 44.

of a dividend to a particular creditor has been withheld, in consequence of delays attributable to the trustee or to other creditors, interest should be allowed from the time it became payable; and this interest will be reckoned at the rate of legal interest in the state, where the trustee has not applied to have the money set aside or invested pending an investigation or re-examination of the claim; and where, upon appeal from an order allowing interest at seven per cent. upon a creditor's dividend, the creditor procures an order directing the trustee to deposit the money with a trust company pending the appeal, it does not constitute a waiver of his right to full interest, but is merely a change of investment by the trustee for the greater security of the creditor.[50]

§ 644. Unclaimed Dividends.—The bankruptcy act provides that "dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full, the balance shall be paid to the bankrupt: Provided, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends."[51] The object of inserting this provision in the statute has been thus explained: "To those familiar with the incidents following the administration of the bankruptcy act of 1867, the purpose of the provisions of said section 66 is quite obvious. It occurred under that act, elsewhere, no doubt, as in this district, that dividends declared in favor of general creditors of the bankrupt, which were covered into the court registry or depository remained uncalled for by the distributees for a great number of years, and this fund in some of the depositories was quite large. As this fund had not for so long a period been called for by the designated distributees, the question arose as to whether or not the courts ought not to hold that this seemingly abandoned fund, in equity, should either be distributed pro rata among the creditors who had not been paid in full, or returned to the bankrupt. But the better opinion seemed to be that such a contingency was a casus omissus of the bankruptcy act,

[50] In re Kitzinger, 19 N. B. R. 307, Fed. Cas. No. 7,863.

[51] Bankruptcy Act 1898, § 66. If the state in which the proceedings are held and in which the property is situated desires to set up a claim to unclaimed dividends in bankruptcy, as property escheated under its laws, it may of course intervene for that purpose in its own name and by its proper officers; but such a contention cannot be set up by the trustee in bankruptcy in opposition to an order directing him to pay the unclaimed dividends into court for dis-

which section 66 of the act of 1898 sought to remedy."[52] It was held that unclaimed dividends on the bankrupt's estate would not be awarded to his administrator, after many years, when opposed by creditors whose claims had not been paid in full.[53]

tribution among the other creditors. In re Orona Mfg. Co. (D. C.) 269 Fed. 855, 46 Am. Bankr. Rep. 800.

[52] In re Fielding (D. C.) 96 Fed. 900, 3 Am. Bankr. Rep. 135.

[53] In re Blight, Fed. Cas. No. 1,540.

CHAPTER XXXII

COMPOSITIONS

§ 645. Nature of Composition in Bankruptcy.—A composition in bankruptcy is an arrangement by which the bankrupt's assets are collected and distributed by direct dealing between the bankrupt and the creditors without the intervention of a trustee. It is at once a settlement and a discharge,[1] and is in the nature of an accord and satisfaction.[2] Unlike a composition with creditors made extra-judicially and as at common law, a composition in bankruptcy binds all the creditors, as well those not joining as those who agree to it, and operates as a discharge of all the debts which would be released by a discharge granted in the ordinary way. The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective claims.[3] "To enforce a distribution of a bankrupt's property among his creditors, upon a basis of equality, and to relieve him from further liability for his debts, are the fundamental objects of the bankruptcy law, and it provides two methods of effectuating these objects. In one, the assets are administered and ratably dis-

[1] In re Ullman (D. C.) 180 Fed. 944, 24 Am. Bankr. Rep. 755. A "composition" is a proceeding under which a bankrupt may settle with his creditors, if the majority agree, by the payment of a lump sum, to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and the costs of the proceeding. American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692. An order approving an agreement for the settlement of claims and distribution of the assets of a corporation, which had been duly adjudged a bankrupt, whereby the corporation was permitted to continue in business, the trustee having realized large profits while conducting its business, is in the nature of a composition. In re O'Gara Coal Co., 260 Fed. 742, 171 C. C. A. 480, 44 Am. Bankr. Rep. 206.

[2] Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682.

[3] In re Lissburger, 2 Fed. 158.

tributed by an assignee [trustee] selected by the creditors, and the bankrupt is discharged only by the special order of the court; in the other, the bankrupt and his creditors deal directly with each other, by compounding the debts at a fixed rate, which composition, when approved by the court and carried into effect, operates as a discharge of the bankrupt without any formal order by the court. But as alternative and equally available means of accomplishing the same general results, they are constituent parts of the system of bankruptcy, and are alike within the scope and designation of bankruptcy proceedings."[4] "The provisions which authorize a composition are highly beneficial to creditors. They allow the majority, under proper circumstances, to close the bankruptcy proceedings without waiting the often slow processes of official administration, and they offer an incentive to the bankrupt to co-operate by putting it out of the power of a single creditor, or a minority of creditors, to defeat his discharge. In the absence of any expressed restrictions in the law, it should not be held that any act or omission of a bankrupt can operate to prejudice the creditors from entering into a composition whenever they deem it best to do so."[5] The court of bankruptcy may enjoin creditors from harassing the debtor by proceedings at law, while his composition proceeding is pending, except as to proceedings to enforce a valid security.[6]

§ 646. Right to Offer Composition.—The proposition for a composition must proceed from the bankrupt. Creditors have not the right to take the initiative in this matter, though no doubt they may informally advise or prompt the bankrupt to offer them terms. Corporations as well as natural persons may avail themselves of this provision of the statute,[7] and one member of a firm which has been adjudged bankrupt may submit an offer of composition to the firm creditors and his individual creditors,[8] and the refusal or neglect of one of the partners in a bankrupt firm to sign a proposition for composition, unless fraudulent, will not render the proceedings invalid as against the other partners, though he will be deprived of all benefit of it.[9] Under the former bankruptcy law, it was held that a written proposition from the bankrupt to

[4] Smith v. Morganstern, 2 Fed. 674; In re Bickmore Shoe Co. (D. C.) 263 Fed. 926, 45 Am. Bankr. Rep. 24.

[5] In re Joseph, 23 Blatchf. 237, 24 Fed. 137. But see In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178, where it is said that the provisions of the bankruptcy act prescribing the requisites of a composition are to be strictly construed as against those who seek by this means to deprive non-assenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings.

[6] In re Hinsdale, 9 Ben. 91, 16 N. B. R. 550, Fed. Cas. No. 6,526.

[7] In re Weber Furniture Co., 13 N. B. R. 529, Fed. Cas. No. 17,330.

[8] Pool v. McDonald, 15 N. B. R. 560, Fed. Cas. No. 11,268.

[9] In re Henry, 9 Ben. 449, 17 N. B. R. 463, Fed. Cas. No. 6,370.

the creditors was not necessary to lay the foundation for the acceptance or rejection by them of the terms offered.[10] But to authorize any step to be taken for the offer and acceptance of a composition, there must first be a pending case in bankruptcy.[11] And until 1910, the debtor was not entitled to offer a composition to his creditors until after there had been an adjudication of bankruptcy entered in his case.[12] In the year mentioned, however, the bankruptcy statute was amended so as to allow an alleged bankrupt to offer terms of composition "either before or after adjudication," and if the offer is made before an adjudication, then "action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed." [13]

Under the act of 1867, the doctrine prevailed that a composition was not a discharge or had not the effect of a discharge; but that it was a payment and satisfaction of debts with the assent of the creditors. And consequently it was held that dissenting creditors could not defeat a proposed composition on grounds which would be sufficient to prevent the bankrupt's discharge. And even the fact that his application for discharge had already been heard and refused was no ground for denying the approval of a composition.[14] But the present statute explicitly authorizes the judge to confirm a composition only if he "is satisfied that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge." [15] And it is the evident purpose of this provision not to allow a bankrupt to obtain a release from the unpaid balance of his debts, by means of a composition, if he is not entitled to the same benefit by means of a discharge obtained in the ordinary way.

It is also a prerequisite to the bankrupt's right to offer terms of composition that he shall have been examined in open court or at a meeting of his creditors, and that he shall have filed in the court the required schedule of his property and list of his creditors.[16] The propriety of this requirement is obvious when it is considered that in no other way

[10] In re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6,192.

[11] In re Reiman, 7 Ben. 455, 11 N. B. R. 21, Fed. Cas. No. 11,673.

[12] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835. See In re Van Auken, 14 N. B. R. 425, Fed. Cas. No. 16,828.

[13] Bankruptcy Act 1898, § 12a, as amended by Act Cong. June 25, 1910, 36 Stat. 838. The fact that the bankrupt has already received his discharge in due course and that a dividend has been paid will not prevent an offer of composition. In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

[14] In re Odell, 9 Ben. 247, 16 N. B. R. 501, Fed. Cas. No. 10,427; Leo v. Joseph, 56 Hun, 644, 9 N. Y. Supp. 612; In re Joseph, 23 Blatchf. 237, 24 Fed. 137; In re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6,192; In re Troth, 19 N. B. R. 253; Fed. Cas. No. 14,188.

[15] Bankruptcy Act 1898, § 12d.

[16] Bankruptcy Act 1898, § 12a. And see In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835; In re Berler Shoe Co. (D. C.) 246 Fed. 1018, 40 Am. Bankr. Rep. 470.

could the creditors obtain the necessary information concerning the debtor's assets and debts, to enable them to decide intelligently on the terms offered. But the proceeding will not be vitiated by a statement in the bankrupt's schedule that the value of his real estate is unknown,[17] or by an innocent mistake in stating the amount due to a particular creditor.[18] If a trustee in bankruptcy has not been appointed before the offer of a composition, none will be appointed after its acceptance by the creditors, since his services are not needed. But in that case, the bankrupt himself stands in the place of a trustee, so far as regards such matters as the set-off of mutual debts.[19]

§ 647. Examination of Bankrupt.—As already stated, terms of composition cannot be offered by the bankrupt or considered by creditors until after the bankrupt "has been examined in open court or at a meeting of his creditors." The phrase "in open court" refers to proceedings before the referee.[20] The examination here contemplated is not an examination of the bankrupt as a witness on the issues of insolvency and the commission of acts of bankruptcy charged, but the examination to which the bankrupt is required to submit when present at the first meeting of his creditors, and hence should be confined to an examination into his resources and liabilities.[21] And the referee has no authority to require any other person than the bankrupt to testify.[22] The debtor himself may be required to attend and testify at an adjourned meeting of the creditors, but he may be excused from so doing if he presents a satisfactory reason therefor and it is accepted by a sufficient vote of the creditors.[23] The minority creditors may insist upon the examination of the bankrupt although the majority are willing to take a vote on the proposition offered without any examination,[24] and where creditors conducting the examination of the bankrupt in an apparently earnest opposition to the composition suddenly cease, without discernible cause, it is proper for the referee to allow another creditor to take up and continue the examination.[25] The refusal of the referee to proceed with the examination until his fees are paid or secured is not

[17] In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17,377.

[18] Ex parte Trafton, 2 Low. 505, 14 N. B. R. 507, Fed. Cas. No. 14,133.

[19] Ex parte Howard Nat. Bank, 2 Low. 487, 16 N. B. R. 420, Fed. Cas. No. 6,764.

[20] In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 Am. Bankr. Rep. 156.

[21] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835; In re Proby, 17 N. B. R. 175, Fed. Cas. No. 11,439. As to examinations of the bankrupt in general, their scope, protection against self-crimination, etc., see supra, §§ 262–271.

[22] In re Dobbins, 18 N. B. R. 268, Fed. Cas. No. 3,943.

[23] In re Tifft, 17 N. B. R. 502, Fed. Cas. No. 14,029.

[24] In re Little, 19 N. B. R. 234, Fed. Cas. No. 8,392.

[25] In re Vanderhoef, Fed. Cas. No. 16,840.

ground of opposition to the recording of a resolution accepting the composition.[26]

§ 648. **Offer of Terms.**—The statute provides that the "consideration" to be paid by the bankrupt to his creditors, together with the "money" necessary to pay debts entitled to priority and the costs of administration, shall be deposited in such place as shall be designated by the judge.[27] But the "consideration" to be paid to the creditors, especially as shown by its contrast with the word "money," does not necessarily mean cash. It may be something equivalent to money, or that will be ultimately convertible into money within a reasonable time, and hence will include any reasonably safe securities, or indorsed promissory notes.[28] But the personal notes of the bankrupt, not indorsed and not secured in any way, will not constitute a consideration which the court will feel bound to approve.[29] And if a creditor dissents and objects, the court will not sanction a composition where the alleged "consideration" is preferred stock in a corporation which the bankrupt has organized for the purpose of continuing his business, and it does not appear that the stock represents any value except the supposed good will of the business, and the effect would be to leave the bankrupt in control of the business and the creditors, in the capacity of stockholders, liable for the corporate debts.[30]

Neither is it necessary that the consideration of the composition should be immediately payable. The question as to the time for its payment is one for the creditors to settle, and their judgment will not be reversed except for valid reasons.[31] Hence it is ordinarily no sufficient objection to the confirmation of a composition that it is payable in installments, secured by notes.[32] A composition agreement to pay more that the estate is able to pay, where the balance is made up by the

[26] In re Tifft, 18 N. B. R. 227, Fed. Cas. No. 14,033.

[27] Bankruptcy Act 1898, § 12b. The terms offered must be in accordance with the law, and the money put up must be for ratable distribution among the creditors entitled. A proposal for composition under which the bankrupt agrees to pay to a certain creditor a sum expended in investigating the bankrupt's financial condition, in addition to his pro rata share, cannot be confirmed. In re M. & H. Gordon (D. C.) 245 Fed. 905, 40 Am. Bankr. Rep. 301.

[28] In re Hurst, 1 Flip. 462, Fed. Cas. No. 6,925; In re Reiman, 7 Ben. 455, Fed. Cas. No. 11,673. If nothing fraudulent enters into the transaction, the money for a composition may be raised by turning over property to a third person who will advance the needed sum. Greil v. Durr, 203 Ala. 644, 84 South. 743. But a bankrupt who has stolen or fraudulently received a sum of money belonging to another cannot retain the amount and schedule the claim as a debt and thereupon effect a composition. In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459.

[29] In re Janeway, 8 Ben. 267, Fed. Cas. No. 7,207; In re Langdon, 2 Low. 387, Fed. Cas. No. 8,058.

[30] In re Woodend, 133 Fed. 593, 12 Am. Bankr. Rep. 768.

[31] In re Wilson, 18 N. B. R. 300, Fed. Cas. No. 17,785.

[32] In re Wilson, 16 Blatchf. 112, Fed. Cas. No. 17,781; In re McNab & H. Mfg.

relatives or friends of the bankrupt, is not evidence of fraud.[33] But a contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal.[34]

It seems also that a composition may take the form of ratifying an assignment for the benefit of creditors made by the bankrupt under the state statute,[35] or may include the adjustment of controversies which a trustee in bankruptcy would have been authorized to compromise,[36] or may be conditioned upon the surrender of all the bankrupt's property to him and the discontinuance of all pending suits.[37] And generally, the bankruptcy law does not provide or imply that compositions, though informal or even preferential, shall be void as between the parties.[38] Thus, a composition may be effected under an agreement for the bankrupt to turn over his entire property and estate to a person who has been selected by the creditors to act as a trustee in their behalf, in carrying out the details of the composition.[39]

The bankrupt will be required to abide by his proposition, and he will not be given permission to withdraw an offer of composition after its acceptance by a majority of the creditors and after an application to confirm, as the Act does not authorize any such procedure.[40] So the bankrupt will not be permitted to trade with his creditors, by increasing an offer of composition after he finds that his first offer was rejected as insufficient; but if he made an insufficient offer of composition in good faith and without opportunity to examine and appraise the available property, he may be allowed to amend his offer.[41] And where there is a fatal defect in the proceedings, but it appears that a majority of the creditors are willing to accept the offer made, the court will reject the offer but at the same time permit the bankrupt to make a new offer.[42]

§ 649. **Acceptance by Creditors.**—The official forms prescribed for proceedings in bankruptcy include a petition, to be filed by the bankrupt, for calling a meeting of creditors to consider his proposal for a composition, in which he is to state the terms offered and that he verily

Co., 18 N. B. R. 388, Fed. Cas. No. 8,906; In re Wronkow, 15 Blatchf. 38, 18 N. B. R. 81, Fed. Cas. No. 18,105.

[33] In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13,140.

[34] McCormick v. Solinsky, 152 Fed. 984, 82 C. C. A. 134, 18 Am. Bankr. Rep. 540.

[35] In re Dumahaut, 15 Blatchf. 20, Fed. Cas. No. 4,124.

[36] In re Lindermah, 166 Fed. 593, 22 Am. Bankr. Rep. 131.

[37] In re Cavan, 19 N. B. R. 303, Fed. Cas. No. 2,528.

[38] In re Black Diamond Copper Min. Co., 11 Ariz. 415, 95 Pac. 117.

[39] Guaranty Trust Co. of New York v. McCabe, 250 Fed. 699, 163 C. C. A. 31.

[40] In re Agree (D. C.) 247 Fed. 590, 40 Am. Bankr. Rep. 773.

[41] In re Cockshaw (D. C.) 220 Fed. 239, 34 Am. Bankr. Rep. 278.

[42] In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

believes that they will be accepted by a majority in number and value of the creditors.[43] This follows the practice under the former bankruptcy act, which required that the creditors should be called upon to assemble in meeting for the purpose of considering an offer of composition, and should vote upon a formal resolution presented to them, for its acceptance or rejection.[44] But the present statute contains no such provision. It merely requires that the composition shall have been "accepted in writing" by a majority of the creditors, after which the bankrupt may make application to the court for its confirmation.[45] It is therefore not necessary to call a meeting of the creditors to vote upon the question whether or not they will accept the terms offered, but the bankrupt may go to them separately and procure their signatures.[46] But all of the creditors must have notice of the proposed composition, whether or not they have proved their claims at the time of the offer; the proposition must be offered and explained to all alike, and they must have a reasonable opportunity to consider it.[47] This having been done, however, the decision of the majority will be binding upon all, where their judgment is exercised in good faith, and there is nothing to indicate fraud, accident, or mistake.[48] And creditors who have signed an acceptance of the composition will not be permitted to disturb the arrangement by withdrawing their signatures, where it is not alleged that they were procured by fraud or misrepresentation.[49] And mere delay, without laches, in obtaining the requisite number of signatures, will not be sufficient ground for refusing to confirm the composition.[50]

It is required that the acceptance shall be by a "majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims." This makes it impossible

[43] Official Form No. 60. The referee may in his discretion adjourn from time to time meetings of creditors in composition proceedings, before as well as after adjudication. In re Bernstein (D. C.) 272 Fed. 1018, 47 Am. Bankr. Rep. 139.

[44] See In re Dumahaut, 15 Blatchf. 20, Fed. Cas. No. 4,124; In re Ewing, 2 Low. 407, Fed. Cas. No. 4,587; In re McDowell, 6 Biss. 193, 10 N. B. R. 459, Fed. Cas. No. 8,776; In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13,229; In re Richmond, 18 N. B. R. 362, Fed. Cas. No. 11,798; Shaw v. Vaughan, 52 Mich. 405, 18 N. W. 126.

[45] Bankruptcy Act 1898, § 12b.

[46] In re Rider, 1 Nat. Bankr. News, 483. The Act of Congress of June 25, 1910, 36 Stat. 838, does indeed provide that the court shall call a meeting of creditors, where composition is offered before an adjudication in bankruptcy; but the object of the meeting is stated to be "the allowance of claims, examination of bankrupt, and preservation or conduct of estates." It is not intended as a meeting for debating and voting on the offer of composition.

[47] In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178.

[48] In re Weber Furniture Co., 13 N. B. R. 559, Fed. Cas. No. 17,331. When a proposed composition has not been assented to by a majority, both in number and amount, of the creditors, the court cannot compel those who have not consented to accept the proposition. In re Goldstein (D. C.) 213 Fed. 115.

[49] In re Levy, 110 Fed. 744, 6 Am. Bankr. Rep. 299.

[50] In re Cavan, 19 N. B. R. 303, Fed. Cas. No. 2,528.

for a composition to be forced through by the vote of one or a few creditors holding heavy claims, or, on the other hand, by a numerical majority of creditors whose claims are trifling or inconsiderable. It is held that those signing the acceptance must constitute a majority in number and amount of the claims at the time of the hearing on application to confirm the composition; it is not enough that they constituted a majority at the time the composition was offered or accepted.[51] An assignee holding a large number of claims should be counted as only one creditor in making up this majority, and he is not entitled to as many votes as the creditors whom he represents, nor are his assignors to be counted in determining the number necessary to make a majority.[52] A partnership being a creditor, any one of the partners may bind the firm by accepting the terms of composition.[53] But in the case of the bankruptcy of a firm and its members, a partner who desires to make a composition with his individual creditors must obtain the acceptance of a majority of those creditors; it is not enough that he obtains the acceptance of a majority of the firm creditors, even though the consenting creditors may be more than a majority of all the creditors, both firm and individual.[54]

§ 650. Same; Creditors Entitled to Vote.—Only those creditors are entitled to participate in composition proceedings, or be counted in ascertaining the necessary majority, who have claims which are technically provable in bankruptcy,[55] and hence not the holder of a merely uncertain and contingent claim,[56] nor the accommodation maker of a note for the bankrupt's benefit,[57] nor one whose claim is for damages for a tort not assessed or liquidated in any way.[58] But for this purpose, the court may allow the ascertainment of an unliquidated claim by permitting the prosecution of a pending suit in a state court, or by ordering an inquiry before itself.[59] Nor is it even sufficient that the creditor should have a provable debt. For the statute explicitly requires the consent of a ma-

[51] In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178. But claims filed after the creditor's meeting closes, though regular in form and filed before the petition for confirmation is filed, cannot be counted in determining whether a majority of the creditors agreed to a composition before adjudication. In re Chinese Fur Importers (D. C.) 269 Fed. 669, 46 Am. Bankr. Rep. 336.

[52] In re Messengill, 118 Fed. 366, 7 Am. Bankr. Rep. 669.

[53] Bruen v. Marquand, 17 Johns. (N. Y.) 58.

[54] In re Ullman, 180 Fed. 944, 24 Am. Bankr. Rep. 755; In re Spades, 6 Biss. 448, 13 N. B. R. 72, Fed. Cas. No. 13,196.

[55] Ex parte Trafton, 2 Low. 505, 14 N. B. R. 507, Fed. Cas. No. 14,133.

[56] In re Kahn, 121 Fed. 412, 9 Am. Bankr. Rep. 107.

[57] Liebke v. Thomas, 116 U. S. 605, 6 Sup. Ct. 496, 29 L. Ed. 744.

[58] In re Bailey, 2 Woods, 222, Fed. Cas. No. 729.

[59] Ex parte Trafton, 2 Low. 505, 14 N. B. R. 507, Fed. Cas. No. 14,133. But where, in composition proceedings, the amount of the claim of one of the creditors is disputed by the debtor, and an estimate is made to be used merely as showing on what sum the creditor is entitled to vote, such estimate does not estop the debtor from questioning the

jority of those creditors "whose claims have been allowed." Therefore it is necessary that the creditor should have proved his claim and secured its allowance.[60] A secured creditor who is fully protected by his security and willing to rest upon it, is not to be counted in.[61] But a creditor whose lien or other security does not fully cover his claim may have the security valued or foreclosed, and will be allowed to prove a claim for the balance or deficiency, and to this extent he may participate in the composition proceedings.[62] And notes of a bankrupt, which are secured only by the personal indorsement of another, may be included as unsecured debts in a composition with creditors, and the confirmation of such composition will discharge the bankrupt as maker of the notes, without affecting the liability of the indorser.[63] But a creditor whose claims are more than offset by the claims of the bankrupt against him cannot be counted in for the purpose of a composition.[64] On the other hand, an objection to a creditor's vote on an offer of composition, on the ground that his claim is invalid, cannot be raised for the first time on an application to confirm the composition.[65] And the vote or consent of a person who is not lawfully to be accounted a creditor will not nullify the proceedings, at least if the elimination of his consent would not change the result.[66] And a creditor who has bought a claim, with the intention of preventing the adoption of a pending offer of composition, may refuse his acceptance and be counted in determining the necessary majority, if he had no fraudulent or merely oppressive motive in the transaction.[67] In the matter of accepting or rejecting a composition, creditors may act by "duly authorized agent, attorney, or proxy."[68] But a person acting under a power of attorney must keep strictly within its limits and cannot vary his instructions.[69] Whether or not a married woman, without authority from her husband, can vote her debt against a bankrupt's estate on the question of accepting a composition, at any rate an affidavit of the husband that he has given his wife authority to

amount of the claim on which the percentage of the composition shall be calculated in paying the composition. In re Holmes, 15 Blatchf. 170, 18 N. B. R. 230, Fed. Cas. No. 6,632a.

[60] In re Ennis, 183 Fed. 859, 25 Am. Bankr. Rep. 383; American Woolen Co. v. Cohen, 142 App. Div. 880, 127 N. Y. Supp. 787; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7,654; In re Bryce, 19 N. B. R. 287, Fed. Cas. No. 2,069.

[61] In re Van Auken, 14 N. B. R. 425, Fed. Cas. No. 16,828; In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13,140.

[62] Flower v. Greenebaum, 9 Biss. 451, 50 Fed. 190; In re Schwab, 8 Ben. 353, Fed. Cas. No. 12,499; Paret v. Ticknor, 4 Dill. 111, 16 N. B. R. 315, Fed. Cas. No. 10,711.

[63] Stauffer-Eshleman Co. v. Abington Hardware & Furniture Co., 131 La. 715, 60 South. 202.

[64] In re Purcell, 18 N. B. R. 447, Fed. Cas. No. 11,470.

[65] In re Bloch, 18 N. B. R. 328, Fed. Cas. No. 1,551.

[66] In re Walshe, 2 Woods, 225, Fed. Cas. No. 17,118.

[67] Ex parte Jewett, 2 Low. 393, 11 N. B. R. 443, Fed. Cas. No. 7,303.

[68] Bankruptcy Act 1898, § 1, cl. 9.

[69] In re Alexander, 8 Ben. 99, Fed. Cas. No. 159.

vote in favor of the composition is a ratification and estoppel validating the wife's act.[70]

§ 651. Same; Fraudulent Inducement to Consent.—The rules of equity being applicable in bankruptcy, and fraud and underhand practices being specially abhorred, a payment of money to a creditor of a bankrupt, to induce him to consent to a pending offer of composition, or to induce him to forbear an active or threatened opposition, will invalidate the entire composition arrangement; and this rule applies although the required number of creditors accepted the offer of composition, without counting the one to whom payment was made, and even though it does not appear that their action was in any way influenced by the transaction.[71] And money so paid may be recovered back by the trustee in bankruptcy, or, according to some of the authorities, by the bankrupt himself or by injured creditors.[72] The rule, however, may possibly be relaxed in a case where the payment was made out of property which was not included in the bankrupt's schedule and was not available as assets in the bankruptcy.[73] The principle is the same where the consent of the creditor is obtained by the bankrupt's secret promise to pay him a larger share of his debt than the other creditors will receive under the composition. "It is a settled doctrine of equity jurisprudence that where creditors unite in a composition agreement, a secret promise by the debtor to one creditor to pay him more than the others is void. There is no reason why this settled doctrine should not apply to compositions in bankruptcy proceedings. There is indeed a stronger reason for its application in such cases than in any others, and the authorities do apply it to compositions in bankruptcy proceedings."[74] Nor is there any difference when the inducement offered to the creditor is that the bankrupt will give him security for the remainder of his debt, or additional security or better security than he now holds; any such bargain will

[70] In re Bailey, 2 Woods, 222, Fed. Cas. No. 729.

[71] In re Bennett, 8 Ben. 561, Fed. Cas. No. 1,312; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; In re Sawyer, 2 Low. 475, 14 N. B. R. 241, Fed. Cas. No. 12,395; Bullene v. Blain, 6 Biss. 22, Fed. Cas. No. 2,124; Brownsville Mfg. Co. v. Lockwood, 11 Fed. 705.

[72] Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; Bean v. Brookmire, 1 Dill. 151, Fed. Cas. No. 1,169; s. c., 2 Dill. 108, 7 N. B. R. 568, Fed. Cas. No. 1,170.

[73] National Park Bank v. Peoples' Bank, 14 Phila. (Pa.) 405, Fed. Cas. No. 10,049.

[74] Carey v. Hess, 112 Ind. 398, 14 N. E. 235. And see Citizens' Nat. Bank v. Kerney, 59 Ind. App. 96, 108 N. E. 139; Lieblein v. George, 193 Mich. 462, 160 N. W. 538; Union Exchange Nat. Bank v. Joseph, 194 App. Div. 295, 185 N. Y. Supp. 403; Nole v. Abate, 190 App. Div. 705, 180 N. Y. Supp. 299; Claflin v. Torlina, 11 N. B. R. 521, 56 Mo. 369; Bean v. Amsinck, 10 Blatchf. 361, 8 N. B. R. 228, Fed. Cas. No. 1,167; In re Keller, 18 N B. R. 331, Fed. Cas. No. 7,654; Woodman v. Stow, 11 Ill. App. 613; Russell v. Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574; Bullene v. Blain, 6 Biss. 22, Fed. Cas. No. 2,124; Cullingworth v. Loyd, 2 Beav. 385. See Jacobs v. Siff, 74 Misc. Rep. 58, 131 N. Y. Supp. 656.

vitiate the composition.[75] Thus, where an insolvent debtor, desiring to obtain his release in bankruptcy by a composition with his creditors, agrees to execute his notes to one of the creditors for the balance of his debt, the notes so given are void.[76]

These rules have been applied with such severity that composition agreements have been held invalid, or have been set aside, on account of a secret or fraudulent advantage given to one creditor, even though it did not appear that the bankrupt himself procured it or was a party to it.[77] In one case, an offer of money was made to two creditors, by the bankrupt's bookkeeper, to induce them to consent, and the bankrupt had no actual knowledge of the offer, but the bookkeeper was employed generally to see the creditors and procure their consent. It was held that the bankrupt was chargeable with what his representative did in the matter, and the whole proceeding was thereby vitiated and the composition must fail.[78] In another case, where a creditor was induced to consent to the composition by an undefined expectation of advantage held out to him by the indorser of the note which the creditor held, the composition was set aside, though it did not appear that the bankrupt had anything to do with it.[79] And in another case it was held that the signature of a creditor to the composition agreement, obtained upon the promise of another creditor to give him the promisor's trade in the future, would invalidate the composition.[80] But on the other hand, that creditors holding notes of a bankrupt corporation, indorsed by individuals connected with the bankrupt, before accepting a composition, obtained an agreement by such indorsers that they should not thereby be discharged, does not invalidate the composition, since that would be the legal result of it without any promise.[81]

Aside from any fraudulent or secret advantage, creditors may be moved to consent to a composition in bankruptcy by reasons other than a strict consideration for the interests of the majority, as, for example, personal friendship for the bankrupt, sympathy with him in his business misfortunes, or the expectation of profitable business with him in the future. Their assent, if given from such motives, is not invalid nor il-

[75] Chuck v. Mesritz, 2 Woods, 204, Fed. Cas. No. 2,710; Bean v. Brookmire, 2 Dill. 108, 7 N. B. R. 568, Fed. Cas. No. 1,170; Howell v. Todd, Fed. Cas. No. 6,783; Way v. Langley, 15 Ohio St. 392; Mallouk v. American Exchange Nat. Bank, 75 Misc. Rep. 285, 135 N. Y. Supp. 78.

[76] Tinker v. Hurst, 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482.

[77] In re Sawyer, 2 Low. 475, 14 N. B. R. 241, Fed. Cas. No. 12,395. Votes in favor of accepting a composition, cast by an assignee who paid face value for the claims shortly before the creditors' meeting, should not be counted in determining the vote on the composition. In re Weintrob (D. C.) 240 Fed. 532, 39 Am. Bankr. Rep. 407.

[78] In re Bennett, 8 Ben. 561, Fed. Cas. No. 1,312.

[79] In re Sawyer, 2 Low. 475, 14 N. B. R. 241, Fed. Cas. No. 12,395.

[80] In re Shine, Fed. Cas. No. 12,788.

[81] In re B. Jacobson & Son Co., 196 Fed. 949, 28 Am. Bankr. Rep. 492.

legal. "But the extent to which the majority is composed of creditors so influenced is an important factor in determining the weight to be given to the assent of the majority upon the question whether the proposed composition is really for the best interest of all creditors." [82] In the absence of any fraudulent or illegal bargain, a creditor, for the purpose of assisting the bankrupt in securing confirmation of a proposed composition, may withdraw his claim, and such creditor will then not be counted in determining the number of creditors whose consent is necessary.[83]

A bankrupt may use his credit to acquire the money required for the purposes of a composition offered conformably to the bankruptcy act to his creditors, and what inducement he gives to the person loaning him the money is a matter which does not concern the existing creditors, and hence does not affect the validity of the composition. And extortion or attempted extortion as a consideration for acting or forbearing to act in bankruptcy proceedings (which is expressly forbidden by the statute) cannot be inferred from a promise by the bankrupt, after adjudication, that if certain creditors would loan him a specified sum to be used in paying the consideration of an offered composition, he would pay them the balance of their claim when such composition was confirmed, after deducting their share of the consideration of the composition, which promise they accepted, making the loan for the said purpose.[84] And when a bankrupt has proposed terms of composition and the same have been approved by a majority of the creditors, such creditors and their attorneys have an interest in common in securing an acceptance of the composition offered, and thereafter may properly participate in securing the necessary consents. And it is not improper for the attorney for the receiver, having secured powers of attorney to that end, to represent and vote for creditors in favor of the composition, so long as no false statements are made, and there is no trickery or collusion between creditors and the bankrupt, and no fraud practised.[85]

§ 652. **Deposit for Payment.**—Before application is made for the confirmation of a composition, "the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings" must have been "deposited in such place as shall be designated by and subject to the order of the judge." [86] This requirement is imperative. If it is not complied with, the composition will not be confirmed, even though the application

[82] In re Griffith Stillings Press (D. C.) 244 Fed. 315, 39 Am. Bankr. Rep. 813; In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

[83] In re M. & H. Gordon (D. C.) 245 Fed. 905, 40 Am. Bankr. Rep. 301.

[84] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493. And see Hickman v. Galveston Dry Goods Co., 42 Tex. Civ. App. 582, 94 S. W. 157.

[85] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325.

[86] Bankruptcy Act 1898, § 12b.

is not opposed by any creditor,[87] and confirmation will also be withheld where the money deposited to cover the cost of the proceedings is not sufficient in amount.[88] The "cost of the proceedings" includes any fees which may be payable under the statute in disbursing the money.[89] And the "debts which have priority," for the purposes of this provision, must be held to include all taxes due from the bankrupt or on his property.[90] As to the consideration to be paid to the creditors, it is held that the bankrupt is required to deposit the percentage offered, not only on all claims filed before confirmation, but also on all other claims listed by him in his schedule; but he is not required to deposit sufficient to cover such percentage on secured claims, nor for any supposed deficiency thereon, if it has not yet been ascertained and filed.[91]

§ 653. **Application, Notice, and Hearing.**—An official form has been prescribed for the application for confirmation of a composition. It is to be addressed to the judge of the court and is signed by the bankrupt, and recites briefly the offer of terms of composition, its acceptance by the required proportion of creditors, and compliance with the various requirements of the act, and asks that the composition may be confirmed by the court.[92] The confirmation or rejection of a composition is a matter which must be passed upon and decided by the judge of the court of bankruptcy; it is not within the jurisdiction or authority of the referee.[93] But it is proper for the referee, when so requested, to appoint a day for bringing the composition before the court for hear-

[87] In re Frear, 120 Fed. 978, 10 Am. Bankr. Rep. 199. But as a composition is solely for the benefit of the creditors, they are entitled, if they choose, to waive the actual deposit of the money or securities constituting the consideration. Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390.

[88] In re Rider (D. C.) 96 Fed. 808, 8 Am. Bankr. Rep. 178.

[89] In re Mayer, 2 Nat. Bankr. News, 527. Where a third person advances money to a bankrupt, to be deposited to perform an offer of composition, such deposit is liable for expenses incurred by reason of the stay secured by the bankrupt by the composition proceedings, if they fail, but not for delay occasioned by the opposition of a creditor to the offer of composition. In re Wiener (D. C.) 217 Fed. 173, 33 Am. Bankr. Rep. 355. Money obtained by bankrupts after the filing of the petition against them, and deposited with an offer of composition, does not belong to the estate, and if the offer was made in good faith, although rejected for insufficiency, the money should not be retained because the continuance of the business pending disposition of the offer resulted in loss to the creditors. In re Morris & Rice (D. C.) 258 Fed. 712, 44 Am. Bankr. Rep. 146. As to liability for expenses incurred in an investigation of the bankrupt's affairs by an attorney, see In re Siegel (D. C.) 252 Fed. 197, 41 Am. Bankr. Rep. 753; and same case on appeal, 256 Fed. 226, 167 C. C. A. 442, 43 Am. Bankr. Rep. 73.

[90] In re Flynn (D. C.) 134 Fed. 145, 13 Am. Bankr. Rep. 720.

[91] In re Harvey (D. C.) 144 Fed. 901, 16 Am. Bankr. Rep. 345. And see In re Atlantic Const. Co. (D. C.) 228 Fed. 571, 35 Am. Bankr. Rep. 838; In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459.

[92] Official Form No. 61.

[93] Bankruptcy Act 1898, § 38, cl. 4; Idem., § 1, cl. 16; In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 Am. Bankr. Rep. 156. See In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

ing, and to issue the required notices to creditors.[94] And it is proper and permissible for the judge to send the case to the referee to ascertain and report the facts, when objections are raised to the approval of the composition which depend on disputed matters of fact, or even in an unopposed case, when the judge has not sufficient facts before him to form a clear judgment as to the propriety of confirming the composition.[95] The statute explicitly requires that the creditors shall have notice of "all hearings upon applications for the confirmation of compositions."[96] If notices are not issued, it will be ground for refusing or withholding confirmation, or perhaps for setting aside an order of confirmation made by the court on the supposition that the notices had been given, and if any creditor is negligently or intentionally omitted from the number of those to whom the notices are sent, it appears that he will not be bound by the result of the proceeding.[97]

It is the evident intention of the statute that any creditors who are dissatisfied with the terms of composition offered by the bankrupt, and unwilling that the composition should be effected, shall have the privilege and opportunity of opposing the application for confirmation, and may thereupon set up any objections within their knowledge which are sufficient, under the statute, to warrant the court in refusing the application. But only creditors who have proved their claims have a standing in court for this purpose.[98] It is immaterial, however, that the opposing creditor bought up a claim against the bankrupt for the very purpose of using it in opposition to the proposed composition, if he had no motive in so doing that was fraudulent or oppressive, but only a desire to realize as much as possible from the estate.[99] Objections may be based on the commission of acts by the bankrupt which would bar his application for a discharge,[100] and also on matters peculiar to the composition, such as irregularities in the offer or its acceptance, the genuineness of signatures purporting to accept, fraudulent practices in

[94] In re Hilborn, 104 Fed. 866, 4 Am. Bankr. Rep. 741.

[95] Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; In re Levy, 172 Fed. 780, 22 Am. Bankr. Rep. 769; In re Walshe, 2 Woods, 225, Fed. Cas. No. 17,118; In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519.

[96] Bankruptcy Act 1898, § 58a, cl. 2; In re Fox (D. C.) 222 Fed. 135, 34 Am. Bankr. Rep. 812. All creditors must be notified of a proposed composition, whether or not they have proved their claims, and must be honestly advised of the true condition of the debtor's affairs. In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

[97] In re Cadenas & Coe, 178 Fed. 158, 24 Am. Bankr. Rep. 135; In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13,229; In re Hilborn, 104 Fed. 866, 4 Am. Bankr. Rep. 741.

[98] In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7,654; In re Mathers, 17 N. B. R. 225, Fed. Cas. No. 9,274; In re Bryce, 19 N. B. R. 287, Fed. Cas. No. 2,069.

[99] Ex parte Morris, 12 N. B. R. 170; In re Comstock, 154 Fed. 747, 19 Am. Bankr. Rep. 65.

[100] In re Cohen, 149 Fed. 908, 18 Am. Bankr. Rep. 84; In re Levenson (D. C.) 223 Fed. 874, 35 Am. Bankr. Rep. 260.

inducing creditors to accept, or the acceptance by a sufficient proportion of the creditors.[101] But a general objection, to the effect that the estate could pay more than the percentage offered by the bankrupt, will not avail unless the disparity is great and evident.[102] And facts known to creditors when they accepted the offer, or when the composition was confirmed, cannot afterwards be used to vitiate or destroy it.[103] Creditors desiring to oppose the application for confirmation should be required to enter their appearance and to file written specifications of the grounds of their opposition,[104] which should be similar to specifications in opposition to a discharge, and they have the burden of proof, and must sustain their objections by satisfying evidence.[105] The bankrupt will of course have the right and capacity to appear and controvert the objections offered by creditors.[106]

Where the court refused to confirm an offer of composition, because the bankrupt, yielding to the demand of a creditor, had promised to reimburse such creditor for certain expenses, which would operate as a preference, but thereafter the claim of that creditor was withdrawn, and it appeared that the composition offered would be for the best interest of the creditors, it was held that the bankrupt should be allowed to renew his application for confirmation of the composition.[107] But where, after the offer of a composition to the creditors, a new or amended offer is made, the court is without authority to confirm it until it has been again submitted in the same manner as an original offer and all the creditors have had opportunity to accept or reject it.[108]

§ 654. Confirmation and Proceedings Thereon.—The bankruptcy act provides that "the judge shall confirm a composition if satisfied that it is for the best interests of the creditors, that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured except as herein

[101] In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Asten, 8 Ben. 350, 14 N. B. R. 7, Fed. Cas. No. 594.

[102] In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17,377.

[103] In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183. But the fact that a former offer of composition, confirmation of which was refused because of irregularity in the proceedings, was accepted by a given creditor, does not preclude him from objecting to a subsequent offer in substantially the same terms. In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119.

[104] Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; City Nat. Bank v. Doolittle 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736.

[105] In re H. J. Arrington Co., 113 Fed. 498, 8 Am. Bankr. Rep. 64; City Nat. Bank v. Doolittle, 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736; Bolles v. Kelley, 222 Fed. 63, 137 C. C. A. 601, 34 Am. Bankr. Rep. 704; In re Rivkin (D. C.) 216 Fed. 218, 33 Am. Bankr. Rep. 170.

[106] In re French, 181 Fed. 583, 25 Am. Bankr. Rep. 77.

[107] In re M. & H. Gordon (D. C.) 245 Fed. 905, 40 Am. Bankr. Rep. 301.

[108] In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

provided, or by any means, promises, or acts herein forbidden."[109] If satisfied of these various particulars, it is the duty of the court to confirm the composition, because it is an arrangement for shortening and simplifying the bankruptcy proceedings which the bankrupt and his creditors have a lawful right to make.[110] At the same time, this section of the statute contemplates that dissenting creditors may be compelled to accept the percentage which is satisfactory to the majority, and may be deprived of their remedies on the balance of their claims, and therefore it should be strictly construed.[111]

As to the requirement that the proposed composition should be "for the best interests of the creditors," it must appear to the court to be for the best interest of all the creditors, not merely for the advantage of certain creditors or of a certain class,[112] and though it is opposed by only a small minority of the creditors, yet the court has power to reject it if satisfied that a settlement of the estate through the agency of a trustee in bankruptcy would be more for their interest.[113] Whether it is expedient to accept the percentage offered by the bankrupt is a question primarily for the creditors themselves to determine, and the approval of a majority of them is prima facie evidence that the acceptance of the offer will be for the best interests of all concerned, so that the burden of proof will rest upon those who oppose the confirmation of the composition on this ground.[114] If no one offers objection to the composition, this fact may be taken by the court as satisfactory evidence that it will be beneficial to all the creditors. But if objection is interposed by a minority, it becomes the duty of the court to make an independent investigation and determination.[115] "In the absence of any ob-

[109] Bankruptcy Act 1898, § 12d. It is within the discretion of the trial judge to refuse to confirm a composition offered by the bankrupt and recommended by the referee, in order that a claimant, denied a hearing because of delay in filing and serving specifications, may have his day in court, and to remand the matter to the referee. In re Soloway & Katz, 211 Fed. 333, 128 C. C. A. 12, 32 Am. Bankr. Rep. 234.

[110] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325; In re Soloway & Katz. 234 Fed. 67, 148 C. C. A. 83, 37 Am. Bankr. Rep. 257.

[111] Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

[112] In re Hannahs, 8 Ben. 533, Fed. Cas. No. 6,033; In re Purcell, 18 N. B. R. 447, Fed. Cas. No. 11,470; In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119. In determining whether an offer of composition should be accepted, the court will not consider the interest of the bankrupt, nor of a purchaser of the bankrupt's property, but only the interest of the creditors. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670.

[113] In re Whipple, 2 Low. 404, 11 N. B. R. 524, Fed. Cas. No. 17,513.

[114] In re Joseph, 23 Blatchf. 237, 24 Fed. 137; In re Hoxie, 180 Fed. 508, 25 Am. Bankr. Rep. 32; In re Waynesboro Drug Co., 157 Fed. 101, 19 Am. Bankr. Rep. 487; In re Barde, 207 Fed. 654; In re Goldstein (D. C.) 213 Fed. 115; In re Dozier Wholesale Grocery Co. (D. C.) 234 Fed. 169, 37 Am. Bankr. Rep. 633.

[115] In re Waynesboro Drug Co., 157 Fed. 101, 19 Am. Bankr. Rep. 487; In re Graham & Sons, 252 Fed. 93, 164 C. C. A. 205, 42 Am. Bankr. Rep. 52.

jection, it should be supposed that the creditors know their own interest best; but when objections are interposed by the minority, whose claims may be discharged against their will, it is the duty of the court to examine those objections fully and carefully. Rather than be annoyed with litigation and dilatory proceedings, or for other causes, charitable or sympathetic, some creditors readily give their consent to propositions made, without scrutiny or hesitation. If no other creditors were involved, courts might, without interposition, permit them to decide for themselves what their own interests demand. But the act calls for the judgment of the court on the question, for the obvious reason that the minority need and are entitled to protection." [116] But "while the rights of the minority creditors should be carefully watched and protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration or by some unfairness or undue influence." [117] In determining this question, the composition offer should be compared with what the creditors would probably receive upon a settlement of the estate by a trustee in bankruptcy, and not with what the debtor might possibly be able to pay them.[118] In other words, the question whether the bankrupt might have offered better terms than he did is not before the court; that is for the creditors to decide before accepting. And only those assets should be considered which have been surrendered or can be recovered and made available for distribution.[119] The question then is whether the creditors will receive more or less under the composition than may reasonably be expected by the administration of the assets of the bankrupt in due course; and if the latter alternative would give them a substantially greater sum than the former, the composition should be denied, as not being for their best interests; otherwise it should be confirmed.[120] Thus, "the court should refuse to confirm a composition when it clearly appears that there have been preferential payments, and there is reasonable cause to believe that

[116] In re Keller, 18 N. B. R. 36, Fed. Cas. No. 7,648; In re Morris (D. C.) 246 Fed. 1021, 39 Am. Bankr. Rep. 352. And see In re Graham & Sons, 252 Fed. 93, 94 C. C. A. 205, 42 Am. Bankr. Rep. 52.

[117] In re Wronkow, 15 Blatchf. 38, 18 N. B. R. 81, Fed. Cas. No. 18,105. The assent of 90 per cent. of a bankrupt's creditors to an offer of composition is prima facie evidence that the composition is for the best interests of creditors, and the burden of showing the contrary is on objecting creditors. In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

[118] In re Whipple, 2 Low. 404, 11 N. B. R. 524, Fed. Cas. No. 17,513.

[119] In re Linderman, 166 Fed. 593, 22 Am. Bankr. Rep. 131.

[120] Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; In re Rider, 1 Nat. Bankr. News, 483; In re Keller, 18 N. B. R. 36, Fed. Cas. No. 7,648; In re H. J. Arrington Co., 113 Fed. 498, 8 Am. Bankr. Rep. 64. And see In re Waynesboro Drug Co., 157 Fed. 101, 19 Am. Bankr. Rep. 487; Riley v. Pope, 186 Fed. 857, 26 Am. Bankr. Rep. 618; In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

they, or any substantial part of the same, may be recovered by the trustee, and it also appears that the estate in hand, with such preferences recovered and added, will net the creditors a greater percentage than is offered in the proposed composition."[121] And the court may also consider the relations of the creditors favoring the composition to the debtor, and the relative number of creditors whose individual opinions are expressed in person in the acceptance of the offer as compared with those who dissent.[122]

As to the objection that the bankrupt has been guilty of acts or omissions which would bar his discharge, if it is clearly made out this objection must prevail, and the composition must be rejected, however advantageous to creditors it might have been, and though it will result in their securing a smaller percentage of their debts than they would have received under the composition.[123] But, generally speaking, an objection of this kind will not be sustained unless it appears that the conduct of the bankrupt to which exception is taken was willfully and intentionally false, fraudulent, or deceitful. This applies to the objection that he failed to keep proper books of account or concealed or destroyed his books or accounts,[124] that he omitted to include in his schedule property which belonged to his estate,[125] that he obtained money or property on credit by means of a materially false financial statement,[126] that he concealed, removed, or misappropriated property,[127] or that he gave fraudulent preferences.[128]

It is also proper for the court to consider any irregularities which may have occurred in the previous proceedings, and indeed it has no

[121] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325.

[122] In re Weber Furniture Co., 13 N. B. R. 529, Fed. Cas. No. 17,330. And see In re Griffith Stillings Press (D. C.) 244 Fed. 315, 39 Am. Bankr. Rep. 813.

[123] In re Griffin, 180 Fed. 792, 25 Am. Bankr. Rep. 206; In re Comstock, 154 Fed. 747, 19 Am. Bankr. Rep. 65; In re Godwin, 122 Fed. 111, 10 Am. Bankr. Rep. 252.

[124] In re Sabsevitz, 197 Fed. 109, 28 Am. Bankr. Rep. 623; In re Olman, 134 Fed. 681, 13 Am. Bankr. Rep. 395; In re Wilson, 107 Fed. 83, 5 Am. Bankr. Rep. 849; In re Barde, 207 Fed. 654; In re Rosenthal, 231 Fed. 449, 145 C. C. A. 443; In re Gottlieb (C. C. A.) 262 Fed. 730, 44 Am. Bankr. Rep. 464, 45 Am. Bankr. Rep. 180; In re Silberstein (D. C.) 225 Fed. 665, 34 Am. Bankr. Rep. 479.

[125] In re B. Jacobson & Son Co., 196 Fed. 949, 116 C. C. A. 499, 28 Am. Bankr. Rep. 492; In re Reiman, 12 Blatchf. 562, 13 N. B. R. 128, Fed. Cas. No. 11,675.

[126] In re Sabsevitz, 197 Fed. 109, 28 Am. Bankr. Rep. 623; In re O'Callaghan, 199 Fed. 662, 29 Am. Bankr. Rep. 304; In re Seligman, 163 Fed. 549, 20 Am. Bankr. Rep. 774; In re Witman (D. C.) 215 Fed. 286; In re Kerner (D. C.) 245 Fed. 807, 40 Am. Bankr. Rep. 183.

[127] In re Bloch, 18 N. B. R. 328, Fed. Cas. No. 1,551; In re Burman (D. C.) 210 Fed. 512, 32 Am. Bankr. Rep. 62. A composition agreement will not be confirmed where, if the bankrupt's statements to sellers of merchandise were correct, a large amount of assets had disappeared concerning which he could give no explanation. In re Weintrob (D. C.) 240 Fed. 532, 39 Am. Bankr. Rep. 407.

[128] In re Jacobs, 18 N. B. R. 48, Fed. Cas. No. 7,159. But see In re Rivkin (D. C.) 216 Fed. 218, 33 Am. Bankr. Rep. 170.

power to confirm an irregular composition.[129] But irregularities which are the effect of mere mistake, and not of fraud, are not necessarily fatal.[130] It is also proper to refuse to confirm a composition where there is evidence that the proceedings are collusive.[131] But though there are indicia of fraud, the court should not refuse to confirm the composition without giving the bankrupt and the majority creditors an opportunity to be heard.[132] It is also essential that the creditors, in considering the terms offered, should have been honestly and fully advised of the true condition of the debtor's affairs, so that they may be presumed to have acted intelligently and understandingly. And if it is shown that this was not the case, the court will be justified in withholding its approval.[133] But when questions of policy and expediency have been fairly before the creditors and disposed of by them, and their action has been approved by the district court, it will not be interfered with on appeal.[134]

§ 655. **Performance and Distribution.**—"Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."[135] Since a composition is essentially a voluntary arrangement and settlement between the bankrupt and his creditors, taking the case out of court, it is doubtful whether the court of bankruptcy has power to make a summary order for its enforcement; and at any rate this will not be done where it does not appear that the creditors are willing and desirous to proceed with it.[136] The official form prescribed for the order of distribution intends that the moneys shall be paid out by the clerk of the court,[137] first to priority claims, then to cover the costs of the proceedings, and then to the general creditors.[138] Money payable to a creditor on a composition cannot be attached, or its payment obstructed,

[129] In re Frear, 120 Fed. 978, 10 Am. Bankr. Rep. 199. And see In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119. The court has no power to confirm a composition which provides for compensation to a receiver in a sum largely in excess of that prescribed by the act. In re Sol Gross & Co., Inc. (D. C.) 274 Fed. 741.

[130] In re Henry, 9 Ben. 449, 17 N. B. R. 463, Fed. Cas. No. 6,370.

[131] In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7,648. But see In re Allen, 17 N. B. R. 157, Fed. Cas. No. 210.

[132] In re Weber Furniture Co., 13 N. B. R. 559, Fed. Cas. No. 17,331.

[133] In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7,648; In re Greenebaum, Fed. Cas. No. 5,769.

[134] In re Wilson, 16 Blatchf. 112, Fed. Cas. No. 17,781.

[135] Bankruptcy Act 1898, § 12e.

[136] In re Remsen, 9 Ben. 260, Fed. Cas. No. 11,698.

[137] But it has been held that the clerk of the District Court is not required to distribute the consideration in composition cases, and the referee should be designated to make the distribution. In re Newbold (D. C.) 244 Fed. 888, 40 Am. Bankr. Rep. 298.

[138] Official Form No. 63. Where an order of confirmation of composition reserved for liquidation the claims of

by proceedings in another court; and the bankruptcy court will not suspend or deny the creditor's right to receive his composition, except in favor of one who claims a specific lien thereon, or who has procured the appointment of a receiver to take the creditor's title.[139] Nor has the court any power to require the bankrupt to pay the composition percentage to a creditor whose claim was not scheduled or filed, or proved within a year after the adjudication.[140] But creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares.[141] The costs of the proceeding are to be paid out of the money deposited by the bankrupt, and constitute a preferred claim. But a fee cannot be allowed to the bankrupt's attorney for his services in securing the confirmation of the composition, when it was opposed by creditors in good faith and on reasonable grounds.[142]

The statute directs that "upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."[143] But a composition proceeding will be regarded as pending until all notes become due which were given by the debtor to effect the same.[144] And it seems that, even after the confirmation of a composition, the estate may be reopened for the purpose of recovering or receiving the surrender of a preference, and although it will inure to the benefit of the bankrupt himself by reason of the composition.[145]

§ 656. Effect of Failure of Performance.—The acceptance of a composition and its confirmation by the court will not operate as a dis-

creditors who were entitled to a special fund, such claims should be liquidated before the distribution of the consideration. In re H. B. Hollins & Co. (D. C.) 230 Fed. 920, 37 Am. Bankr. Rep. 205. Where a creditor who was a party to a composition agreement sues on the debt, the burden is on the debtor to prove a tender to the plaintiff of the proportion of the debt called for by the composition. Ocean Accident & Guarantee Corp. v. Beck (Sup.) 153 N. Y. Supp. 932. And see Beck v. Witteman Bros., 186 App. Div. 961, 173 N. Y. Supp. 491.

[139] In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7,918.

[140] In re Abrams & Rubins, 173 Fed. 430, 23 Am. Bankr. Rep. 25; In re Lane, 125 Fed. 772, 11 Am. Bankr. Rep. 136. But see In re Englander's, Inc. (D. C.) 267 Fed. 1012, 45 Am. Bankr. Rep. 508. A creditor may participate in a composition, though he fails to prove his claim within the year, if the bankrupt admits its validity and deposits funds for its partial payment. In re Aarons (D. C.) 243 Fed. 634, 40 Am. Bankr. Rep. 229.

[141] Ex parte Hamlin, 2 Low. 571, 16 N. B. R. 320, Fed. Cas. No. 5,993.

[142] In re Martin, 153 Fed. 582.

[143] Bankruptcy Act 1898, § 70f. See In re McKeon, 7 Ben. 513, 11 N. B. R. 182, Fed. Cas. No. 8,858. Where a bankrupt has deposited money in pursuance of an offer of composition, and proceedings are delayed by the opposition of minority creditors, but the offer is finally confirmed, the bankrupt is entitled to any interest which the money may have earned in the mean time. In re Kelley (D. C.) 223 Fed. 383, 35 Am. Bankr. Rep. 127.

[144] In re Hinsdale, 9 Ben. 91, 16 N. B. R. 550, Fed. Cas. No. 6,526.

[145] In re B. Feinberg & Sons, 187 Fed. 283, 26 Am. Bankr. Rep. 587.

charge or release of the debtor from any given debt, unless the distributive share of that creditor under the composition agreement is actually paid or unconditionally tendered to him.[146] And the question whether such payment or tender has been made is open to trial in any court in which the debt may be sued for.[147] Hence, upon failure of performance of the condition of a composition, the creditor may pursue his appropriate remedies for the recovery of his original debt (not merely for the percentage offered under the composition) in any proper court.[148] And if the debtor is subsequently adjudged bankrupt in a fresh proceeding on his own petition, having paid the cash part of a composition previously effected, but not the notes which were given for the remainder of the percentage offered, the creditors may prove their original claims, giving credit for the cash received.[149] But mere delay in paying composition notes, occasioned by legal or other difficulties, does not ipso facto avoid the composition, nor does failure to pay one creditor according to the composition forfeit the bankrupt's rights as to creditors punctually paid.[150] Where a bankrupt executes composition notes with an agreement that if any note shall be in default all shall become due, and a creditor taking the notes assigns his claim to a third person, and takes the latter's notes in payment and retains the composition notes as security, he cannot proceed on the composition notes until after default on the other notes.[151] One who has agreed to become a surety on a composition will not be summarily compelled to give security, where it appears that the bankrupt has abandoned the composition, and has not given the notes agreed upon as a part of it.[152]

§ 657. Vacating and Setting Aside Composition.—It is provided in the bankruptcy act that "the judge may, upon the application of parties in interest, filed at any time within six months after a composition

[146] In re Hurst, 1 Flip. 462, 13 N. B. R. 455, Fed. Cas. No. 6,925; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Whittemore v. Stephens, 48 Mich. 573, 12 N. W. 858. If a bankrupt fails to comply with a composition agreement with his creditors, they will have an action thereon against him. Kobre Assets Corp. v. Baker, 178 App. Div. 62, 164 N. Y. Supp. 597.

[147] Whittemore v. Stephens, 48 Mich. 573, 12 N. W. 858.

[148] Ransom v. Geer, 20 Blatchf. 535, 12 Fed. 607; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Page v. Carton, 64 Misc. Rep. 645, 120 N. Y. Supp. 277. Compare In re Bayly, 19 N. B. R. 73, Fed. Cas. No. 1,144. Where notes are given under an order confirming a composition in bankruptcy, and are not paid, the original debt revives. American Woolen Co. v. Friedman, 97 Misc. Rep. 593, 163 N. Y. Supp. 162.

[149] In re A. B. Carton & Co., 148 Fed. 63, 17 Am. Bankr. Rep. 343; Brookmire v. Bean, 3 Dill. 136, 12 N. B. R. 217, Fed. Cas. No. 1,942.

[150] In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7,918.

[151] Willey v. Browne, 206 Pa. St. 322, 55 Atl. 1029.

[152] In re Remsen, 9 Ben. 260, Fed. Cas. No. 11,698.

has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practised in the procurement of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition." [153] This action can be taken only by the court of bankruptcy. No state court can annul or disregard a discharge in bankruptcy, whether it was obtained in the ordinary way or as the result of a composition.[154] And further, authority to set aside a composition is confided only to the "judge" of the court of bankruptcy, which term, in this instance, does not include the referee.[155] The application for this purpose should take the form of a petition. And leave to file such a petition should only be refused when the petition on its face shows that, upon the facts stated, the petitioner could not under any circumstances be entitled to relief.[156] The petition should show by proper averments sufficient grounds why the court should revoke the order confirming the composition or set it aside.[157] And it should allege that the fraud charged was not known to the petitioner until after the composition was confirmed, but need not state the time or manner in which such knowledge was acquired, nor is it demurrable for omitting to allege that the petitioner restored or offered to restore the consideration immediately on discovery of the fraud, or for want of a tender of the consideration into court.[158] The petition should be verified in the usual form for a bill in equity, but verification by an agent is not sufficient when the principal allegations are made on information and belief and the agent is not shown to have any personal knowledge of the facts.[159] Notice should be given to the bankrupt and to all the creditors.[160] Such a petition can be filed only by a "party in interest." But a creditor who has assigned his claim, receiving a consideration therefor, is no longer a party in interest, although the assignment was procured through the

[153] Bankruptcy Act 1898, § 13. See In re Ballance, 206 Fed. 505, 30 Am. Bankr. Rep. 689. A composition cannot be set aside where all the facts constituting the alleged fraud were known to the creditors before it was confirmed. Union Furniture Co. v. Walker-Cooley Furniture Co., 206 Fed. 217, 31 Am. Bankr. Rep. 73. As to the necessity and duty of setting aside the composition when fraud is found, see In re Ballance, 219 Fed. 537, 135 C. C. A. 287, 33 Am. Bankr. Rep. 642.

[154] Turner v. Hudson, 105 Me. 476, 75 Atl. 45, 18 Ann. Cas. 600. But compare Mallouk v. American Exchange Nat. Bank, 75 Misc. Rep. 285, 135 N. Y. Supp. 78.

[155] See Bankruptcy Act 1898, § 1, cl. 16, and Id. § 38.

[156] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

[157] City Nat. Bank v. Doolittle, 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736. See In re Kass (D. C.) 263 Fed. 138, 45 Am. Bankr. Rep. 301.

[158] In re Roukous, 128 Fed. 645, 12 Am. Bankr. Rep. 128.

[159] In re Roukous, 128 Fed. 648, 12 Am. Bankr. Rep. 169.

[160] Ex parte Hamlin, 2 Low. 571, 16 N. B. R. 320, Fed. Cas. No. 5,993.

fraud and misrepresentation of the trustee and the bankrupt.[161] But the fact that a creditor has commenced an action at law against the bankrupt will not prevent him from also maintaining a petition to set aside the composition.[162]

An application of this kind positively cannot be considered by the court unless filed within the six months allowed by the statute.[163] The limitation prescribed is absolutely imperative. And the time allowed is not enlarged by the provision found in another section of the statute, that a discharge may be revoked within a year after it is granted, for this relates only to a discharge obtained in the ordinary way, not to a discharge resulting by operation of law from the confirmation of a composition.[164]

So also, the section quoted above defines exclusively the ground upon which a composition may be set aside, namely, fraud in its procurement. It operates as a limitation upon the general grant of authority given to courts of bankruptcy by an earlier provision (section 2, clause 9) to "set aside compositions and reinstate the cases." [165] Hence the court has no power to set aside a composition merely because the petitioning creditor's address was erroneously stated in the bankrupt's schedule, in consequence of which the creditor had no notice of the proceedings in bankruptcy, and did not prove his debt, and the same was not included in the composition.[166] Neither can a composition be set aside on account of inadequacy, or because the estate might have paid a larger dividend,[167] nor because the bankrupt has failed to carry out his part of the composition agreement.[168] But the fact that the bankrupt made a false schedule or a false oath to his schedule constitutes ground for setting aside a composition subsequently effected, as the schedule is supposed to inform the creditors of the extent and nature of his assets and to influence them in accepting terms of composition offered, and hence fraud in the schedule is fraud practised in procuring the composition.[169] So the fact that the trustee joins with the bank-

[161] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

[162] In re Roukous, 128 Fed. 648, 12 Am. Bankr. Rep. 169.

[163] In re Ennis, 183 Fed. 859, 25 Am. Bankr. Rep. 383; In re Jersey Island Packing Co., 152 Fed. 839, 18 Am. Bankr. Rep. 417; In re Eisenberg, 148 Fed. 325, 16 Am. Bankr. Rep. 776. See, as to laches of petitioning creditors, In re Herman, 9 Ben. 436, 17 N. B. R. 440, Fed. Cas. No. 6,405.

[164] In re Jersey Island Packing Co., 152 Fed. 839, 18 Am. Bankr. Rep. 417.

[165] In re Rudnick, 93 Fed. 787, 2 Am. Bankr. Rep. 114; In re Cooper Bros., 166 Fed. 932, 20 Am. Bankr. Rep. 634. See In re Siegel, 256 Fed. 226, 167 C. C. A. 442, 43 Am. Bankr. Rep. 73.

[166] In re Rudnick, 93 Fed. 787, 2 Am. Bankr. Rep. 114.

[167] In re Shaw, 9 Fed. 495.

[168] In re Eisenberg, 148 Fed. 325, 16 Am. Bankr. Rep. 776.

[169] In re Roukous, 128 Fed. 645, 12 Am. Bankr. Rep. 128.

rupt to effect a composition to the detriment of creditors by means of false representations as to the assets, is ground not only for his removal, but also for vacating the composition.[170] But a composition should not be set aside though some creditors fraudulently obtained notes for more than their pro rata share, where it appears that the applicant for the order also obtained a preference.[171]

It is provided that when a composition is set aside, "the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition."[172] But all acts regularly done in pursuance of the composition, the same having been partly performed, remain valid, and the rights and title of the trustee are subject thereto.[173] There is also a provision that "in the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication."[174] In this event, it has been held that a workman, employed by the bankrupt during the time when the composition was in force, is entitled to payment of his wages earned during that period. "These wages are somewhat analogous to claims for expenditures incurred in preserving or taking care of the bankrupt's property before it comes into the hands of the assignee; and such expenditures will be allowed by the bankruptcy court in the exercise of its equitable jurisdiction."[175]

§ 658. **Operation and Effect.**—The confirmation and performance of a composition operate as a discharge by operation of law, and release the bankrupt from all of his debts which would be barred by a discharge, and in like manner terminate all remedies of creditors for the enforcement of their claims against either the bankrupt or his property.[176] Fur-

[170] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

[171] In re Sacharoff & Kleiner, 163 Fed. 664, 20 Am. Bankr. Rep. 814.

[172] Bankruptcy Act 1898; § 70d.

[173] Ex parte Hamlin, 2 Low. 571, 16 N. B. R. 320, Fed. Cas. No. 5,993.

[174] Bankruptcy Act 1898, § 64c.

[175] In re Wells, 4 Fed. 68.

[176] In re Radley (D. C.) 252 Fed. 205, 42 Am. Bankr. Rep. 261; In re O'Gara Coal Co., 260 Fed. 742, 171 C. C. A. 480, 44 Am. Bankr. Rep. 206; Herrington v. Davitt (Sup.) 145 N. Y. Supp. 452; Greenberger v. Schwartz, 261 Pa. 265, 104 Atl. 573. See In re Bjornstad, 11 Biss. 68, 5 Fed. 791; In re Becket, 2 Woods, 173, 12 N. B. R. 201, Fed. Cas. No. 1,210; Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Mandell v. Levy, 47 Misc. Rep. 147, 93 N. Y. Supp. 545; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Denny v. Merrifield, 128 Mass.

ther, "upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him." [177] That is, the legal effect of a composition is that the legal title to the bankrupt's property remains in him. If it is effected before an adjudication, the title is never divested; if afterwards, the title which vests by operation of law in the trustee in bankruptcy is automatically taken from him and revested in the bankrupt.[178] And "a certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt, if recorded, would impart." [179] Thereafter the bankrupt is at liberty to deal with his assets as he may please,[180] and may prosecute suits in his own name, though he may consent to the further prosecution of an action in the name of the trustee in bankruptcy, after the composition, and in that case the court in which the suit is pending will not be obliged to dismiss it on account of the closing of the estate in bankruptcy.[181] But the bankrupt takes back his title in the same condition in which it was before the bankruptcy. If he held a merely defeasible title to certain property, his trustee in bankruptcy would acquire no higher or stronger title, and if a composition is offered and confirmed, the original title, but no more, will revest in the bankrupt.[182] Also, the confirmation of a composition suspends the functions of the trustee as to administering the estate.[183] And the statute directs that the case (that is, the pending case in bankruptcy) shall be "dismissed." But this only means that the court shall proceed

228; Turner v. Hudson, 105 Me. 476, 75 Atl. 45, 18 Ann. Cas. 600. Where an offer of composition was accepted by creditors of a firm adjudged a bankrupt without a proviso that the partners individually should be discharged from partnership debts or without any agreement that they should remain liable, the mere fact that the referee and the court and the parties had a mistaken view as to what the law was did not affect the legal liability of the partners. Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741.

177 Bankruptcy Act 1898, § 70f.

178 Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, 34 Am. Bankr. Rep. 723; American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692; Houston v. Shear (Tex. Civ. App.) 210 S. W. 976; Ligon v. Allen, 56 Miss. 632; McDonald v. H. E. Taylor Co., 144 App. Div. 329, 128 N. Y. Supp. 1048. On confirmation of a composition, money belonging to the bankrupt in the hands of a third person, which had not been reduced to possession by the trustee, at once revests in the bankrupt free from any claim or right of the trustee. In re Frischknecht, 223 Fed. 417, 139 C. C. A. 11, 34 Am. Bankr. Rep. 530. After the confirmation of a composition, the court of bankruptcy has no jurisdiction of a petition by the bankrupt to require the proceeds of property claimed by him to be paid over to him. In re Hollins, 229 Fed. 349, 143 C. C. A. 469, 36 Am. Bankr. Rep. 168. And see In re Hollins, 238 Fed. 787, 151 C. C. A. 637, 38 Am. Bankr. Rep. 432.

179 Bankruptcy Act 1898, § 21g.

180 In re Shaw, 9 Fed. 495.

181 Stone v. Jenkins, 176 Mass. 544, 57 N. E. 1002, 79 Am. St. Rep. 343. And see Merchants' Bank of Mobile v. Zadek, 203 Ala. 518, 84 South. 715.

182 Zavelo v. Cohen Bros., 156 Ala. 517, 47 South. 292.

183 In re August, 19 N. B. R. 161, Fed. Cas. No. 645.

no further with the administration of the estate under the bankruptcy act, and does not forbid further proceedings in the case such as are necessary to terminate it, for instance, appropriate proceedings before the referee to pass upon the accounts of the trustee, and, after allowing the same, to direct that the trustee be discharged and the estate closed.[184] But no new claims against the estate can be filed and allowed,[185] though a question as to what amount the trustee shall pay over to the bankrupt as the balance in his hands should be determined by the referee under a special order of the court.[186] And the trustee cannot be held personally liable to a creditor for the difference between the dividend received under the composition agreement and the greater dividend which the trustee assured the creditor he would receive, such assurance being merely an expression of opinion that the larger dividend could be realized.[187]

At least all those creditors who have proved their claims will be regarded as parties to the bankruptcy proceeding so as to be bound and concluded by the composition;[188] and after the confirmation of the composition it is too late for creditors to claim that a conveyance made by the debtor before the bankruptcy was fraudulent as against them.[189] Just as in the case of a discharge obtained in the ordinary way, a composition prevents creditors from maintaining any action or suit for the enforcement of a claim or the collection of a debt which would be released by a discharge.[190] And a creditor who receives a composition with full knowledge of the facts cannot afterwards require a set-off to be enforced against the debtor in a court of equity, which he had opportunity to assert at the time the composition was effected.[191] A suit against the bankrupt in a state court by a creditor included in the composition may be enjoined pending the completion of the composition,[192] but after that, the court of bankruptcy will not interfere by injunction, as the debtor has a complete defense by simply pleading the composition and his consequent discharge.[193] But there is this difference between the effect of

[184] United States v. Sondheim, 188 Fed. 378. And see In re Hyman, 18 N. B. R. 299, Fed. Cas. No. 6,985. As to payment of costs, see In re Harris, 117 Fed. 575, 15 Am. Bankr. Rep. 705.

[185] In re Cooper Bros., 166 Fed. 932, 20 Am. Bankr. Rep. 634. A judgment liquidating a claim not proved and filed within the statutory time is barred where there has been confirmation of a composition. In re Maytag-Mason Motor Co. (D. C.) 223 Fed. 684, 35 Am. Bankr. Rep. 160.

[186] In re August, 19 N. B. R. 161, Fed. Cas. No. 645.

[187] Bossak v. Siff, 147 App. Div. 177, 132 N. Y. Supp. 109.

[188] Clairmonte v. Napier Motor Co., 11 Cal. App. 265, 104 Pac. 712; In re Rodger, 18 N. B. R. 381, Fed. Cas. No. 11,992.

[189] McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836.

[190] Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258.

[191] Hunt v. Holmes, 16 N. B. R. 101, Fed. Cas. No. 6,890.

[192] In re Shafer, 17 N. B. R. 116, Fed. Cas. No. 12,695.

[193] In re Negley, 20 Fed. 499.

a composition and that of a discharge, that a new promise will not revive a debt included in and settled by the composition, though it would in the case of a discharge. For a discharge does not satisfy or extinguish the debt, though it bars any further proceeding for its collection; but a composition is an accord and satisfaction and wipes out the cause of action.[194] But a composition, like a discharge, must be pleaded in order to be a bar.[195] And if set up after the time for final performance of the terms of the composition, the plea must aver not only the proceedings leading up to the composition and its confirmation by the court, but also performance on the part of the debtor, or a sufficient excuse for failure to perform.[196] It is also provided that "a certified copy of an order confirming or setting aside a composition, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." [197] The statute does not in terms direct that such evidence shall be accepted as conclusive, but it is difficult to see how it could be accorded any less effect. And at any rate it is well settled that a composition, confirmed by the bankruptcy court, cannot be impeached in any collateral proceeding in a state court.[198]

§ 659. **Same; What Debts Released.**—The bankruptcy act provides that "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." [199] Broadly speaking, therefore, all those debts to which the bankrupt might plead in bar a discharge obtained in the ordinary course of administration will be equally released by the confirmation of a composition,[200] while, on the other hand, an action on a debt or claim will not be barred by composition proceedings if it would not be discharged by the debtor's dis-

[194] Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258. Contra, see In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119. A bankrupt's promise, made prior to a composition settlement and repeated thereafter, to pay a certain creditor's entire claim if he aided the bankrupt in securing money to settle with his other creditors, was void, where the subsequent promise was merely a reassurance of payment, with no additional consideration. Lieblein v. George, 193 Mich. 462, 160 N. W. 538.

[195] Consolidated Rubber Tire Co. v. Vehicle Equipment Co., 121 App. Div. 764, 106 N. Y. Supp. 599. A creditor who has received the debtor's note given in a composition with creditors, and who denies the effect of the composition as discharging his debt, is chargeable with the amount of the note unless he produces or accounts for it. Beck v. Witteman Bros., 185 App. Div. 643, 173 N. Y. Supp. 488; Id., 186 App. Div. 961, 173 N. Y. Supp. 491.

[196] Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682. And see Dobson v. Noyes, 39 Kan. 471, 18 Pac. 697.

[197] Bankruptcy Act 1898, § 21f.

[198] Loeffler v. Wright, 13 Cal. App. 224, 109 Pac. 269; Farwell v. Raddin, 129 Mass. 7.

[199] Bankruptcy Act 1898, § 14c. As to effect of order releasing the bankrupt, after confirmation of a composition, on the compensation of the referee in the case, see Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390.

[200] In re Jersey Island Packing Co.,

charge in bankruptcy under the act.[201] Thus, a composition will not affect the debtor's liability on a debt contracted by his fraud,[202] nor while he was acting in a fiduciary capacity,[203] nor in respect to a claim founded on one of the kinds of torts mentioned in the statute as not being released by a discharge.[204] The act provides that a discharge shall not release the debtor from such claims as "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."[205] Hence a creditor whose name and address, with the amount due him, are correctly stated in the bankrupt's schedule, being chargeable with notice of the bankruptcy proceedings (even if he has no actual knowledge), must prove his claim and secure its allowance, whereupon he will be entitled to notice of the composition proceedings; and if he neglects to do this, and pays no attention to the bankruptcy proceedings, he is chargeable with laches and can take no action to recover the balance of his debt after receiving the dividend payable under the composition.[206] On the other hand, a creditor whose claim is not listed by the bankrupt nor included in the composition arrangement, and who does not of his own motion come in and prove his claim, will not be affected or bound by the composition, provided he at all times lacked that notice or actual knowledge of the bankruptcy proceedings which would have charged him with the duty of intervening for the protection of his own interests.[207] This rule has been applied to a case where the creditor's address was stated as "unknown," and he took no part in the composition proceedings,[208] and in a case where the debt was stated at less than its true amount, and the creditor did not join in the composition and objected to its confirmation

152 Fed. 839, 18 Am. Bankr. Rep. 417; Consolidated Rubber Tire Co. v. Vehicle Equipment Co., 121 App. Div. 764, 106 N. Y. Supp. 599; Herschman v. Justices of the Municipal Court of City of Boston, 220 Mass. 137, 107 N. E. 543. See Beck v. Witteman Bros., 185 App. Div. 643, 173 N. Y. Supp. 488.

[201] Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536; Bayly v. Washington & Lee University, 106 U. S. 11, 1 Sup. Ct. 88, 27 L. Ed. 97; Zavello v. J. S. Reeves & Co., 171 Ala. 401, 54 South. 654; Mudge v. Wilmot, 124 Mass. 493. Compare Wells v. Lamprey, 16 N. B. R. 205.

[202] In re Tooker, 8 Ben. 390, 14 N. B. R. 35, Fed. Cas. No. 14,096.

[203] In re Rodger, 18 N. B. R. 252, Fed. Cas. No. 11,991; In re Shafer, 17 N. B. R. 116, Fed. Cas. No. 12,695; Succession of Bayly, 30 La. Ann. 75.

[204] In re Coe, 183 Fed. 745, 106 C. C A. 181, 26 Am. Bankr. Rep. 352.

[205] Bankruptcy Act 1898, § 17.

[206] In re Wilkens, 191 Fed. 94, 27 Am. Bankr. Rep. 235; In re Abrams & Rubins, 173 Fed. 430, 23 Am. Bankr. Rep. 25; In re Starr, 56 Fed. 142; Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177; Glover Grocery Co. v. Dorne, 116 Ga. 216, 45 S. E. 347.

[207] In re Blackmore, 11 Fed. 412; Flower v. Greenbaum, 9 Biss. 455, 2 Fed. 897; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Robinson v. Soule, 56 Miss. 549; Collins & Toole v. Crews, 3 Ga. App. 238, 59 S. E. 727; Shulman v. Graves, 63 Ala. 402; Smith v. Rucker, 88 Ark. 615, 114 S. W. 1181; In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653.

[208] Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682.

and refused to accept any money under it.[209] Again, creditors whose claims are barred by failure to file or present the same within the year allowed for that purpose have no standing before the bankruptcy court in composition proceedings.[210] But the fact that a corporation has been adjudged bankrupt and has effected a composition with its creditors will not prevent creditors from maintaining an action against its directors, to enforce a liability imposed on them personally by statute for failing to report the condition of the company, since such a statutory liability is entirely independent of the cause of action against the corporation.[211] And on the same principle, any rights or claims which the creditors of a corporation may have against stockholders of it, growing out of the action of the corporation in issuing stock in exchange for property of inadequate value, are unaffected by a composition effected by the corporation in bankruptcy with the creditors.[212]

§ 660. **Same; Effect on Rights of Secured Creditors.**—Liens and other securities which would be valid and unassailable in the ordinary course of bankruptcy proceedings are equally protected in composition arrangements and are not discharged or affected.[213] If the bankrupt wishes to bring the claims of secured creditors under the operation of the composition, it is his duty to have the securities valued as the law directs.[214] But, the other conditions existing, a composition confirmed by the court has the effect to confine a secured creditor to his security, and to discharge the debtor from personal liability for the debt,[215] so that, for example, after the confirmation of a composition, a mortgage creditor cannot recover a deficiency judgment on the foreclosure of his mortgage.[216] But so far as concerns the property affected by a lien, the court of bankruptcy loses all control over it when the composition is confirmed, and cannot thereafter protect it, by injunction, from seizure

[209] Hewes v. Rand, 129 Mass. 519.

[210] In re French (D. C.) 181 Fed. 583, 25 Am. Bankr. Rep. 77.

[211] Wood & Selick v. Vanderveer, 55 App. Div. 549, 67 N. Y. Supp. 371.

[212] In re Berler Shoe Co. (D. C.) 246 Fed. 1018, 40 Am. Bankr. Rep. 470.

[213] Oilfields Syndicate v. American Improvement Co. (C. C. A.) 260 Fed. 905, 44 Am. Bankr. Rep. 490; In re Cyclopean Co., 167 Fed. 971, 93 C. C. A. 447, 21 Am. Bankr. Rep. 679; In re Stowell (D. C.) 24 Fed. 468; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159; Vaughn-Carlton Co. v. Studebaker Corp., 22 Ga. App. 684, 97 S. E. 99. A discharge of a bankrupt by means of a composition with creditors does not discharge the lien of a judgment rendered more than four months before the filing of the petition in bankruptcy. Oilfields Syndicate v. American Improvement Co. (D. C.) 256 Fed. 979, 43 Am. Bankr. Rep. 325; Cobb v. First Nat. Bank of Livonia (D. C.) 263 Fed. 1000, 45 Am. Bankr. Rep. 48. But compare American Can Co. v. Schenkel, 110 Misc. Rep. 345, 180 N. Y. Supp. 102.

[214] Flower v. Greenebaum (C. C.) 50 Fed. 190.

[215] In re Lytle, 11 Phila. (Pa.) 522, 14 N. B. R. 457, Fed. Cas. No. 8,650. Compare Cavanna v. Bassett, 9 Biss. 435, 3 Fed. 215.

[216] American Woolen Co. v. Cohen, 142 App. Div. 880, 127 N. Y. Supp. 787.

under process from a state court.[217] But a creditor holding security cannot play fast and loose with the composition proceedings, and ask to have his share of the composition impounded to await the result of a suit in which he seeks to establish and enforce his lien, so that he may claim it if unsuccessful.[218] But notes of a bankrupt which are secured only by the personal indorsement of a third person may be included as unsecured debts in a composition with creditors, and the confirmation of such composition will discharge the bankrupt as maker of the notes.[219] And an attachment levied about a month before the adjudication of bankruptcy, on a debt included in and released by the composition, will be dissolved thereby.[220]

§ 661. Same; Joint Liability of Others With Bankrupt.—A composition in bankruptcy, while it discharges the bankrupt himself from any further liability for his debts, subject to the exceptions and limitations mentioned in the preceding sections, does not operate to exonerate or release any person who is jointly liable with him for the payment of the same debt, or who is collaterally liable therefor, in the character of a surety, guarantor, or otherwise.[221] Thus, a composition in bankruptcy proceedings against the maker of a note does not discharge the indorser, since the release of the maker is effected by operation of law and not by the act or consent of the parties.[222]

[217] In re Lytle, 11 Phila. (Pa.) 522, 14 N. B. R. 457, Fed. Cas. No. 8,650.

[218] York Mfg. Co. v. Merchants' Refrigerating Co., 168 Fed. 108, 21 Am. Bankr. Rep. 748.

[219] Stauffer, Eshleman Co. v. Abington Hardware & Furniture Co., 131 La. 715, 60 South. 202.

[220] Miller v. Mackenzie, 43 Md. 404, 13 N. B. R. 496, 20 Am. Rep. 111. And see In re Lilienthal, 256 Fed. 819, 168 C. C. A. 165, 43 Am. Bankr. Rep. 665.

[221] Easton Furniture Mfg. Co. v. Caminez, 146 App. Div. 436, 131 N. Y. Supp. 157; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; In re Burchell, 4 Fed. 406; Mason & Hamlin Organ Co. v. Bancroft, 1 Abb. N. C. (N. Y.) 415; Moore v. Stanwood, 98 Ill. 605; Hem v. Allen, 179 Ill. App. 223; E. S. Parks Shellac Co. v. Harris, 237 Mass. 312, 129 N. E. 617; McClintic-Marshall Co. v. City of New Bedford (Mass.) 131 N. E. 444; Sprague, Warner & Co. v. Fischer, 199 Mich. 601, 165 N. W. 858; Martin Furniture Co. v. Massey, 135 Tenn. 338, 186 S. W. 451.

[222] In re American Paper Co. (D. C.) 255 Fed. 121, 42 Am. Bankr. Rep. 716; Silverman v. Rubenstein (Sup.) 162 N. Y. Supp. 733; Bromberg v. Self, 16 Ala. App. 627, 80 South. 631.

CHAPTER XXXIII

DISCHARGE OF BANKRUPT

§ 662. **Right to Discharge in General.**—The granting of a discharge to a bankrupt is not optional or discretionary with the court. The provision of the statute is that "the judge shall hear the application for a discharge" and "discharge the applicant" unless statutory cause for refusing the discharge is shown.[1] The right to a general discharge from one's debts by means of a proceeding in bankruptcy is of course purely statutory, in the sense that it can be granted or withheld, or coupled with conditions or limitations, as the legislative department may deem best.[2] But when it has been granted as an integral part of the system of bankruptcy, then, the conditions having been fulfilled, it becomes a legal right of the particular bankrupt, and can be denied only when some objection is filed and affirmatively sustained based upon a reason specifically enumerated in the statute.[3] The purpose of the act being to release honest debtors from the burden of their debts, and its provisions being very liberal as concerns the discharge of the bankrupt, it should be given a liberal construction in his favor on this point.[4] At the same time, a discharge in bankruptcy, while claimable as a right in a proper case, is a high privilege, and, to earn it, the bankrupt must comply strictly with the provisions of the statute, and it must be shown that all the steps required to be taken have been taken,[5] and also, it is said, the bankrupt must have taken all proper steps to expedite the proceedings.[6] But objections must be founded on one or more of the statutory grounds, and it is only upon one or other of these grounds that the discharge can be refused.[7] The bankrupt, for instance, cannot be punished by withholding his discharge for improvident or reckless financial transactions which occurred long before the filing of the petition.[8]

[1] Bankruptcy Act 1898, § 14b; In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266; In re Whitney (D. C.) 250 Fed. 1005, 41 Am. Bankr. Rep. 548; In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478.

[2] In re Armstrong (D. C.) 248 Fed. 292, 40 Am. Bankr. Rep. 770.

[3] In re Kaufman, 239 Fed. 305, 152 C. C. A. 293, 38 Am. Bankr. Rep. 648.

[4] In re Rosenfeld (C. C. A.) 262 Fed. 876, 44 Am. Bankr. Rep. 390; In re Jacobs, 241 Fed. 620, 154 C. C. A. 378, 39 Am. Bankr. Rep. 385; In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668.

[5] Popejoy v. Diedrich, 68 Colo. 383, 189 Pac. 841; In re Levenstein (D. C.) 180 Fed. 957, 24 Am. Bankr. Rep. 822.

[6] In re Wollowitz, 192 Fed. 105, 112 C. C. A. 445, 27 Am. Bankr. Rep. 558.

[7] In re Epstein (D. C.) 248 Fed. 191, 40 Am. Bankr. Rep. 406; Robinson v. J. R. Williston & Co. (C. C. A.) 266 Fed. 970, 45 Am. Bankr. Rep. 619.

[8] In re Boner (D. C.) 169 Fed. 727, 22 Am. Bankr. Rep. 151.

The right to apply for a discharge in bankruptcy is personal to the bankrupt, and his failure or delay in applying therefor cannot affect the rights of third persons, other than in so far as he may fail to procure a discharge from subsequent liability on their claims.[9] Further, the right of discharge in bankruptcy is essentially a constituent of the proceedings in which the adjudication and the administration of the bankrupt estate are had, and it cannot be detached and taken to a court of another jurisdiction.[10] It appears from the language of the statute that an application for discharge must be filed while the proceedings are still "pending" in the bankruptcy court. But it has been held that where the referee, without the knowledge of the bankrupt, entered an order discharging the trustee, there being no assets and no claims proved, this is not such a final disposition of the case as to deprive the bankrupt of his right to a discharge.[11]

Corporations, as well as natural persons, are entitled to the benefit of a discharge in bankruptcy.[12] And in a proceeding against a partnership, although no adjudication is made against the partners, they and their estates are brought within the jurisdiction of the court, which may on their application discharge them from further liability for the partnership debts.[13]

§ 663. Same; Responsibility for Acts of Partner, Agent, or Employé.—Under former bankruptcy acts it was held that misconduct in the management of a partnership business, if of such a character as to come within the statutory definition of the grounds for refusing a discharge, would be effective to bar the discharge of both partners, though one alone was guilty or reprehensible and the other entirely innocent.[14] But this doctrine is not favored by the modern authorities. Almost without exception they hold that the making of a false statement for credit, the concealment of assets, or the failure to keep books of account, when wholly the act of one partner, may be sufficient to prevent the granting of a discharge to that partner or to the firm, but will not be ground for refusing a discharge to another partner who did not participate in the wrongful act and had no knowledge of it.[15] Even the making of a statement for credit by one partner, from facts stated to him by

[9] In re Skaats (D. C.) 233 Fed. 817, 37 Am. Bankr. Rep. 579.

[10] Armstrong v. Norris, 247 Fed. 253, 159 C. C. A. 347, 40 Am. Bankr. Rep. 735.

[11] In re Forsyth, 9 Biss. 560, 4 Fed. 629.

[12] In re Hargadine-McKittrick Dry Goods Co. (D. C.) 239 Fed. 155, 39 Am. Bankr. Rep. 142. And see, supra, § 150.

[13] Armstrong v. Norris, 247 Fed. 253, 159 C. C. A. 347, 40 Am. Bankr. Rep. 735.

See Peterson v. Peregoy & Moore Co., 180 Iowa, 325, 163 N. W. 224.

[14] In re George, 1 Low. 409, Fed. Cas. No. 5,325; In re Colcord, 2 Hask. 455, Fed. Cas. No. 2,970a.

[15] Ragan, Malone & Co. v. Cotton & Preston, 200 Fed. 546, 118 C. C. A. 640, 29 Am. Bankr. Rep. 597; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, 21 Am. Bankr. Rep. 457; Frank v. Mich-

his copartner, who was to furnish the entire capital for the business, though in fact untrue, will not defeat the right of the partner making it to his discharge in bankruptcy, where the falsity of the material statements so made was unknown to him.[16] And if fraud can in any case be imputed to an innocent partner on account of the fraud of his copartner, as respects the false or improper keeping of books of account, it can only be in cases where the fraudulent entries or omissions have reference to partnership transactions, so as to fall within the general scope of the partner's authority. And the fraud of a partner in so keeping the firm books, of which he had sole charge, as to conceal withdrawals of money by himself from his partner as well as from creditors cannot be imputed to the innocent partner, so as to bar his right to a discharge.[17]

On similar principles, where a business belonging to a married woman is conducted wholly by her husband, to whom she confides its entire management, and he, without her knowledge or privity, conceals property from the creditors, and the wife becomes bankrupt, she is not to be deprived of her right to a discharge by reason of her husband's misconduct, being herself guiltless of any actual fraudulent intent, and her negligence in relation to the business not being equivalent to fraud, for the purposes of a penal statute, though perhaps, in this case, her discharge may be made conditional upon her using all reasonable means within her power to discover to the bankruptcy court the assets so concealed.[18] Still there are decisions holding that if the act or omission in question fell within the general scope of the authority confided to a manager or agent, it must be imputed to the principal.[19] Thus it is said that one appointed by a duly executed writing as manager and attorney in fact for the owner in conducting a mercantile business has such authority that a materially false property statement made by him for the purpose of obtaining goods for sale in such business on credit is one made by the owner, so as to bar the latter's discharge.[20] And where the manager of a bankrupt firm (not himself a member of the firm), acting within the scope of his authority, signed a false statement of the firm's financial condition for the purpose of obtaining credit, this was held sufficient to prevent the discharge of either of the partners, though one of them was a woman advanced in years, who took no part in the business, but

igan Paper Co., 179 Fed. 776, 103 C. C. A. 268, 24 Am. Bankr. Rep. 261; In re Cotton & Preston, 183 Fed. 181, 25 Am. Bankr. Rep. 517; In re Schachter, 170 Fed. 683, 22 Am. Bankr. Rep. 389.

[16] W. S. Peck Co. v. Lowenbein, 178 Fed. 178, 101 C. C. A. 498, 24 Am. Bankr. Rep. 138.

[17] In re Schultz, 109 Fed. 264, 6 Am. Bankr. Rep. 91.

[18] In re Hyman, 97 Fed. 195, 3 Am. Bankr. Rep. 169; In re Meyers, 105 Fed. 353, 5 Am. Bankr. Rep. 4.

[19] In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

[20] In re Reed, 191 Fed. 920, 26 Am. Bankr. Rep. 286.

intrusted her interests to such manager, who was her son.[21] So it has been ruled that a merchant who has failed to keep proper books of account is not entitled to his discharge in bankruptcy, though the fault was wholly with his bookkeeper, as the law puts upon the merchant the duty of seeing that his books are properly kept.[22] And the same ruling was made in the case of a bankrupt who signed a blank statement of his financial condition and directed his bookkeeper to fill it out. This was done and the statement submitted to a bank, which, relying on its correctness, lent the bankrupt money. The statement was false in material particulars, but this the bankrupt did not know, as he relied on the bookkeeper's honesty and accuracy. Nevertheless his discharge was refused.[23] And where the bankrupt did business through the medium of a corporation, which was merely a form of business activity, a concealment of assets belonging to him will be sufficient to bar his discharge, though the assets would first be applicable to the creditors of the corporation.[24]

§ 664. Same; Effect of Prior Application or Decision.—An order refusing to grant a discharge to a bankrupt, if in the nature of a final determination on the merits of the controversy, is a bar to any second application for discharge in the same proceedings, and must be regarded as res judicata as to the matters involved,[25] though it may be otherwise if the refusal was based merely on some irregularity in the proceedings.[26] Though such an attempt is rarely made, it is not uncommon for a bankrupt who has failed to obtain his discharge to file a new petition in bankruptcy within a short time and renew the endeavor to secure a release from his debts. But it is held that a subsequent proceeding in bankruptcy for the sole purpose of obtaining a discharge, to which a prior proceeding has determined that the bankrupt is not entitled, presents no ground for relief, is vexatious, and cannot lawfully be maintained.[27] And this rule is applied even though the bankrupt's applica-

[21] In re Schwartz & Co., 201 Fed. 166, 28 Am. Bankr. Rep. 670.

[22] In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999.

[23] In re Gilpin, 160 Fed. 171, 20 Am. Bankr. Rep. 374.

[24] In re Berger, 200 Fed. 325, 29 Am. Bankr. Rep. 712.

[25] In re Brockway, 21 Blatchf. 136, 23 Fed. 583; In re Royal, 113 Fed. 140, 7 Am. Bankr. Rep. 636. A bankrupt's acquittal on the charge of fraudulently concealing his assets does not preclude refusing him a discharge in bankruptcy on specifications that he had concealed his books of account and had obtained credit by false statements. In re Simon, (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

[26] In re Connelly, 2 Cranch C. C. 415, Fed. Cas. No. 3,111.

[27] Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; Monk v. Horn (C. C. A.) 262 Fed. 121, 44 Am. Bankr. Rep. 472. In re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; In re Kuffler, 168 Fed. 1021, 93 C. C. A. 671, 22 Am. Bankr. Rep. 289. But compare In re Claff, 111 Fed. 506, 7 Am. Bankr. Rep. 128. And see In re Farrell, 5 N. B. R. 125, Fed. Cas. No. 4,680, as to a new proceeding in bank-

tion for a discharge in the earlier proceeding was dismissed for want of prosecution.[28] And in fact there are numerous decisions holding that, although the question of a discharge was never tried or determined in the first proceeding, still the bankrupt's failure to apply for it within the time limited is substantially equivalent to a judgment by default in favor of his creditors, and renders the question of his right to receive it res judicata, and so will constitute sufficient ground for refusing to discharge him in a subsequent proceeding in bankruptcy, at least so far as concerns the debts which were provable under the earlier petition, though he may be discharged in the later case as against new debts.[29] But it has been held that an order refusing to discharge a bankrupt under the bankruptcy act of 1867 does not estop the bankrupt from applying for a discharge in a proceeding instituted under the act of 1898, upon the same facts and even as to the same debts.[30] But a judgment denying a debtor a discharge from a debt under a state insolvency law is not an adjudication of his right to a discharge from such debt in bankruptcy, where it does not appear upon what grounds the judgment was based.[31]

The statute also provides that a discharge may not be granted to the bankrupt if he has, "in voluntary proceedings, been granted a discharge in bankruptcy within six years." [32] This provision has no application

ruptcy where the discharge was formerly refused only on the ground that it was not applied for in due time. See also Bluthenthal v. Jones, 51 Fla. 396, 41 South. 533, 13 L. R. A. (N. S.) 629, 120 Am. St. Rep. 181, as to the effect of failure on the part of creditors to raise any objection to the second application for discharge, though notified thereof.

[28] Pollet v. Cosel, 179 Fed. 488, 103 C. C. A. 68, 24 Am. Bankr. Rep. 678.

[29] Horner v. Hamner, 249 Fed. 134, 161 C. C. A. 186, L. R. A. 1918E, 465, 40 Am. Bankr. Rep. 817; In re Schwartz (D. C.) 248 Fed. 841, 41 Am. Bankr. Rep. 246; Siebert v. Dahlberg, 218 Fed. 793, 134 C. C. A. 460, 33 Am. Bankr. Rep. 272; In re Cooper (D. C.) 236 Fed. 298, 37 Am. Bankr. Rep. 625; In re Warnock (D. C.) 239 Fed. 779, 39 Am. Bankr. Rep. 539. In re Bacon, 193 Fed. 34, 113 C. C. A. 358, 27 Am. Bankr. Rep. 736 (writ of error denied in Bacon v. Buffalo Cold Storage Co., 225 U. S. 701, 32 Sup. Ct. 836, 56 L. Ed. 1264); Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; In re Richter, 190 Fed. 905, 27 Am. Bankr. Rep. 215; In re Springer, 199 Fed. 294, 29 Am. Bankr. Rep. 96; In re Westbrook, 186 Fed. 414, 26 Am. Bankr. Rep. 181; In re Stone, 172 Fed. 947, 23 Am. Bankr. Rep. 24; In re Von Borries, 168 Fed. 718, 21 Am. Bankr. Rep. 849; In re Weintraub, 133 Fed. 1000, 13 Am. Bankr. Rep. 711.

[30] In re Herrman, 106 Fed. 987, 46 C. C. A. 77; In re Herrman (D. C.) 134 Fed. 566.

[31] In re Bybee (D. C.) 124 Fed. 1011, 10 Am. Bankr. Rep. 761.

[32] Bankruptcy Act 1898, § 14b, as amended by Act Cong. June 25, 1910, § 6. And see In re Chase (D. C.) 186 Fed. 408, 26 Am. Bankr. Rep. 456. The bankrupt may be granted a discharge in voluntary proceedings as to debts from which, in a voluntary proceeding had within six years previous, he was not discharged because the application was not filed within the twelve-month period. In re Skaats (D. C.) 233 Fed. 817, 37 Am. Bankr. Rep. 579. For the purpose of this provision a release obtained by the confirmation of a composition with creditors is the same thing as a "discharge" in bankruptcy. In re Radley (D. C.) 252 Fed. 205, 42 Am. Bankr. Rep. 261. Though the law precludes more than one discharge in voluntary bankruptcy within a period of six years, an insolvent may have more than one adjudication within that period and his property be distribut-

to cases in which a discharge was applied for before its enactment, but it applies to all cases in which the application for discharge is made after its passage, and such application does not expose it to the objection of being retroactive legislation.[33] The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to the proceedings in which the second discharge is sought, so that it makes no difference in the application of the provision whether the second proceeding is based on a voluntary or an involuntary petition.[34] The period of six years is to be measured backward from the time of the hearing on the application for the second discharge, and not from the time of the commencement of the second proceeding.[35]

§ 665. Parties Entitled to Oppose Discharge.—The provision of the statute is that opposition to a bankrupt's application for discharge may be made by "the trustee and other parties in interest,"[36] but there is a special limitation as to intervention by the trustee which will be noticed later. Any creditor of the bankrupt who has a provable claim is a party in interest and entitled to oppose the discharge, though he has not proved his claim or secured its allowance.[37] In that case he must of course prove, or it must clearly appear by the evidence before the court, that he is really a creditor.[38] And specifications of objection filed by

ed among his creditors, though he can obtain but one discharge. In re Johnson (D. C.) 233 Fed. 841, 37 Am. Bankr. Rep. 597.

[33] In re Neely (D. C.) 134 Fed. 667, 12 Am. Bankr. Rep. 407; In re Seaholm, 136 Fed. 144, 69 C. C. A. 142, 14 Am. Bankr. Rep. 292.

[34] In re Seaholm, 136 Fed. 144, 69 C. C. A. 142, 14 Am. Bankr. Rep. 292; In re Neely, 134 Fed. 667, 12 Am. Bankr. Rep. 407.

[35] In re Haase, 164 Fed. 1022, 21 Am. Bankr. Rep. 928; In re Jordan, 142 Fed. 292, 15 Am. Bankr. Rep. 449; In re Little, 137 Fed. 521, 70 C. C. A. 105, 13 Am. Bankr. Rep. 640. See In re Dunphy, 206 Fed. 680, 30 Am. Bankr. Rep. 760; In re Rubin (D. C.) 259 Fed. 607, 43 Am. Bankr. Rep. 729.

[36] Bankruptcy Act 1898, § 14b, as amended by Act Cong. June 25, 1910, 36 Stat. 838. As to the meaning of the phrase "parties in interest," see In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210. A mere volunteer or stranger to the proceeding cannot be heard to object to the bankrupt's application for discharge. In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266; In re White (D. C.) 238 Fed. 874, 38 Am. Bankr. Rep. 481.

[37] In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Groome, 1 Fed. 464; In re Murdock, 1 Low. 362, 3 N. B. R. 146, Fed. Cas. No. 9,939; In re Sheppard, 1 N. B. R. 439, Fed. Cas. No. 12,753; In re Book, 3 McLean, 317, Fed. Cas. No. 1,637; In re Smith, 8 Blatchf. 461, Fed. Cas. No. 12,977; In re Boutelle, Fed. Cas. No. 1,705; Haxtun v. Corse, 2 Barb. Ch. (N. Y.) 506. Compare Talcott v. Friend, 179 Fed. 676, 103 C. C. A. 80, 24 Am. Bankr. Rep. 708. And see the following for contrary decisions under the act of 1867: In re Balmer, 3 Hughes, 637, Fed. Cas. No. 820; In re King, Fed. Cas. No. 7,784; In re Cohaus, Fed. Cas. No. 2,959b. The fact that objections are interposed to the allowance of a given creditor's claim against the bankrupt does not estop the objecting creditor from opposing the discharge for the omission of such liability from a financial statement on which credit was extended. In re Waite (D. C.) 223 Fed. 853, 35 Am. Bankr. Rep. 189.

[38] In re Boutelle, 2 N. B. R. 129, Fed. Cas. No. 1,705.

one not shown to be a creditor should state the facts showing how and why he is a party in interest.[39] But one who has a suit pending against the bankrupt, for the recovery of a debt which is contested, is entitled to contest the application for discharge, though the claim has not been proved in the bankruptcy proceeding.[40] Where a person is named as a creditor in the bankrupt's schedule, that fact will constitute prima facie evidence that he has the right to appear in opposition to the discharge,[41] though, on the other hand, if the bankrupt, in pursuance of an arrangement with a certain creditor, omits the debt from his schedule, the creditor will not be permitted to object to the discharge, at least on the ground of such omission.[42] The term "creditor," as descriptive of one having the right to oppose the discharge in the character of a party in interest, will include a person having an equitable claim against the estate,[43] or a contingent and unliquidated claim which, for that reason, is not provable in the bankruptcy proceeding,[44] or a claim secured by a mortgage,[45] and even a debt barred by the statute of limitations at the time when the creditor filed his specifications of objection.[46] But opposition cannot be made by a creditor whose claim is not provable in the bankruptcy proceedings or is of such a character that it would not be affected by the discharge.[47] A claim which is illegal does not constitute the holder a "creditor" for this purpose, but if the bankrupt has allowed it to be filed and proved, without interposing any objection to it or requesting the trustee to do so, it seems that he will be estopped to deny the standing of the creditor when the question of his discharge comes up.[48] Where the creditor is a corporation, its stockholders are not parties in interest in such sense as to be entitled individually to oppose the bankrupt's discharge.[49] And where a partnership which had proved a claim against the estate is afterwards dissolved, without any disposition

[39] In re Levey, 133 Fed. 572, 13 Am. Bankr. Rep. 312.

[40] In re Conroy, 134 Fed. 764, 14 Am. Bankr. Rep. 249.

[41] In re Barrager, 191 Fed. 247, 27 Am. Bankr. Rep. 366; Haley v. Pope, 206 Fed. 266, 124 C. C. A. 330, 30 Am. Bankr. Rep. 644.

[42] In re Whetmore, Deady, 585, Fed. Cas. No. 17,508.

[43] In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817.

[44] Ex parte Traphagen, Fed. Cas. No. 14,140. See In re Menzin, 238 Fed. 773, 151 C. C. A. 623, 38 Am. Bankr. Rep. 435.

[45] In re Ely, Fed. Cas. No. 4,428.

[46] In re Westbrook, 186 Fed. 414, 26 Am. Bankr. Rep. 181.

[47] In re Meikleham (D. C.) 236 Fed. 401, 38 Am. Bankr. Rep. 324; In re Nathanson (D. C.) 155 Fed. 645, 19 Am. Bankr. Rep. 56. But compare In re Armstrong (D. C.) 248 Fed. 292, 40 Am. Bankr. Rep. 770, holding that a creditor having a provable claim may oppose the discharge on the ground that the bankrupt obtained credit on false statements, although such creditor's claim would not be barred by the discharge. A creditor cannot oppose the discharge and at the same time sue on his claim in the state courts, on the ground that it is not provable in bankruptcy and not dischargeable. In re Menzin (D. C.) 233 Fed. 333, 37 Am. Bankr. Rep. 468.

[48] In re A. B. Carton & Co., 148 Fed. 63, 17 Am. Bankr. Rep. 343.

[49] In re Tallmadge, Fed. Cas No. 13,738.

being made of the claim as between the partners, no one of them can maintain opposition to the bankrupt's discharge without showing affirmatively that all consent.[50]

It is also important to notice that where the ground of opposition is fraud on the part of the bankrupt (as, in the case of concealing or transferring property, or obtaining credit on a false statement), the right to make the objection is not confined to the person defrauded, but it may be made by any other creditor or party in interest.[51] And further, the right of creditors to oppose a bankrupt's discharge on the ground of an alleged fraudulent transaction does not depend on their having taken any legal proceedings, through the trustee or otherwise, to recover the property affected.[52]

Creditors may, however, be estopped from opposing the bankrupt's application for discharge. Thus, a creditor will be estopped from setting up in opposition to such application matters which have already been litigated between them to final decree in a state court, the decision therein having been adverse to the contention of the creditor.[53] And a similar estoppel is raised against a creditor who participated in a previous general assignment by the bankrupt, to the extent of ratifying it and taking measures under it to secure his claim, or accepting a preference which it gave him,[54] though it has been held that the mere acceptance of a dividend under such an assignment will not estop the creditor if he had no power to dissent from the assignment or to repudiate or avoid it.[55] A creditor may also be estopped from setting up in opposition to the discharge a false financial statement made by the bankrupt, and on which he obtained credit from such creditor, where the creditor has expressly waived the fraud, by admitting in writing that any inaccuracies in the statement were inadvertent and without wrongful intent.[56]

As to opposition by the trustee in bankruptcy, this right is given to him by the 1910 amendment to the bankruptcy act, but only on condition that he "shall be authorized so to do at a meeting of creditors called for that purpose." Unless so authorized, he has no right to

[50] In re Hendrick, 143 Fed. 647, 16 Am. Bankr. Rep. 218. See In re Hagy, 220 Fed. 665, 136 C. C. A. 307, 34 Am. Bankr. Rep. 319.

[51] In re A. B. Carton & Co., 148 Fed. 63, 17 Am. Bankr. Rep. 343; In re Harr, 143 Fed. 421, 16 Am. Bankr. Rep. 213. But compare In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156. Creditors may object to the bankrupt's discharge because of false statements made to obtain credit from another creditor, although that creditor does not object. In re Kretz (D. C.) 212 Fed. 784, 32 Am. Bankr. Rep. 365.

[52] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[53] In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490.

[54] In re Jones, 12 N. B. R. 48, Fed. Cas. No. 7,452; In re Schuyler, 3 Ben. 200, 2 N. B. R. 549, Fed. Cas. No. 12,494.

[55] In re Kraft, 3 Fed. 892.

[56] In re Russell, 176 Fed. 253, 100 C. C. A. 77, 23 Am. Bankr. Rep. 850.

intervene and file objections.[57] But on the other hand, when he has obtained authority from the creditors, neither the referee nor the court has power to withhold from him the right to file objections, or to prescribe as conditions to its exercise that no expense shall be imposed on the estate or that it shall not delay settlement beyond a stated time.[58] The requirement of the statute that authority to the trustee to file objections must be given at a meeting of the creditors called for that purpose is satisfied if the authority is given at a meeting called by the referee; it is not necessary that the judge should issue the call and hold the meeting, or that he should specially authorize such call and meeting.[59] The District Court, sitting in bankruptcy, should not on its own motion interpose objections to the bankrupt's application for discharge, since it sits to try, and not to create, the issue.[60]

§ 666. Grounds for Refusal of Discharge.—The precedent conditions having been complied with, the grant or refusal of a discharge does not rest in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed acts or omissions.[61] There must of course be jurisdiction of the application, and it is said that the court is without jurisdiction unless there are dischargeable debts, and where the only claims listed by a bankrupt, or filed, are stated in his schedule to be disputed, and are in fact in litigation, the court has no power to grant him a discharge.[62] Aside from these cases, however, a discharge can be refused only on one or more of the specific grounds mentioned in the statute not on account of any acts or conduct on the part of the bankrupt however reprehensible, which do not clearly come within the words of the law.[63] And

[57] In re Hockman, 205 Fed. 330, 30 Am. Bankr. Rep. 921. See In re Levey, 133 Fed. 572; In re White, 248 Fed. 115, 160 C. C. A. 255, 41 Am. Bankr. Rep. 458. Where, after notice given of the hearing on the trustee's petition to have leave to oppose the bankrupt's discharge, no creditor appears either to contest or to authorize such action, the referee has no authority to order the trustee to oppose the discharge. In re White (D. C.) 238 Fed. 874, 38 Am. Bankr. Rep. 481.

[58] In re Churchill, 197 Fed. 114, 28 Am. Bankr. Rep. 603.

[59] In re Reiff, 205 Fed. 399, 29 Am. Bankr. Rep. 753.

[60] In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266.

[61] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468.

[62] In re Gulick, 190 Fed. 52, 26 Am. Bankr. Rep. 632.

[63] Woodruff v. Cheeves, 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; Strause v. Hooper, 105 Fed. 590, 5 Am. Bankr. Rep. 225; In re Clark, Biss. 73, 3 N. B. R. 16, Fed. Cas. No. 2,800; In re Elliott, 2 N. B. R. 110, Fed. Cas. No. 4,391. But in a case where the bankrupt's financial transaction showed that his financial difficulties were the result of suspicious and fraudulent dealings, and he had been guilty of gross misrepresentations as to his solvency, and his assets in bankruptcy were purchased by a pawnbroker, who at once installed the bankrupt as manager of the business, with the same apparent control thereof as before, the court held, with severe animadversions that the bankrupt was not entitled to a discharge. In re Miller, 135 Fed. 591, 14 Am. Bankr. Rep.

these specified grounds for denying a discharge are not in the nature of offenses or forfeitures of the right to a discharge, but are rather in the nature of violations of conditions precedent.[64] It is therefore no sufficient ground for refusing to discharge the bankrupt that he misused and wasted his estate before the filing of the petition,[65] or that his petition was filed merely for the purpose of defeating the claims of the judgment creditor who objects.[66] But it has been ruled that the court is not required to grant a discharge to a bankrupt, knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it was granted.[67] Under the act of 1867, the bankrupt was required to show that he had in all respects conformed to the provisions of the act, and the judge was required to be satisfied of this before granting the discharge; and it was held that the bankrupt was made responsible for the regularity of the proceedings, and was bound to see that all the necessary steps were regularly taken, or he could not have his discharge.[68] But under the present statute, an application for discharge is considered to be an independent proceeding, in which the jurisdiction and the validity of the prior proceedings are not involved,[69] so that a discharge cannot be denied on account of an irregularity in the former steps of the bankruptcy, such as an error in the name of the bankrupt in giving notices to creditors.[70] While the commission of an offense punishable by imprisonment under the terms of the bankruptcy law is made ground for withholding a discharge, this privilege cannot be denied to a bankrupt because he has violated a criminal statute of the state, not denouncing the particular offenses made punishable by the bankruptcy act,[71] or because of the alleged offense of larceny, or larceny as bailee, committed by the bankrupt against the objecting creditor more than a year before the petition is filed.[72] But on

329. But one of the statutory grounds for refusing a discharge had already been established in this case.

[64] In re Seeley, 19 N. B. R. 1, Fed. Cas. No. 12,628.

[65] In re Rogers, 1 Low. 423, 3 N. B. R. 564, Fed. Cas. No. 12,001.

[66] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143. But where a schoolteacher prepared for a bankruptcy in which no assets should be disclosed, in order to avoid payment for an expensive fur coat, it was held that her omission from the schedules of salary due at the time they were verified would preclude her discharge. In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664.

[67] In re Luftig, 162 Fed. 322, 15 Am. Bankr. Rep. 773.

[68] In re Bellamy, 1 Ben. 426, 1 N. B. R. 96, Fed. Cas. No. 1,267; In re Littlefield, 1 Low, 331, 3 N. B. R. 57, Fed. Cas. No. 8,398.

[69] In re Walrath, 175 Fed. 243, 24 Am. Bankr. Rep. 541.

[70] In re Elkind, 175 Fed. 64, 23 Am. Bankr. Rep. 166.

[71] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325. The provision which bars a discharge if the bankrupt has "committed an offense punishable by imprisonment as herein provided" is limited to acts made offenses by the Bankruptcy Act. In re Oliner (C. C. A.) 262 Fed. 734, 44 Am. Bankr. Rep. 450, 45 Am. Bankr. Rep. 185.

[72] In re Wolf, 159 Fed. 299, 20 Am. Bankr. Rep. 304.

the other hand, to deprive a bankrupt of his right to a discharge, it is not necessary that he shall have been convicted of one of the offenses enumerated in the act, but it is enough if it be shown by clear and convincing evidence that he has been guilty of such offense.[73] The sections making the offense of knowingly and fraudulently making a false oath by the bankrupt in the bankruptcy proceedings, in respect to his property, a ground for denying him a discharge, do not extend to previous conduct or transactions which are merely fraudulent as to creditors and not made criminal.[74] Finally, the insanity of a bankrupt, though it has prevented his examination by the creditors and still continues, is not a bar to his discharge, as it is not one of the grounds specified for refusing a discharge, and especially in view of the fact that the statute provides that the insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as if insanity had not supervened.[75]

§ 667. Same; Want of Jurisdiction.—In several decisions under former bankruptcy laws, it was held competent for creditors to oppose a bankrupt's application for discharge on the ground that the court had no jurisdiction of the case originally, that is, no jurisdiction to entertain the petition and make the adjudication, either because the bankrupt was not locally within the jurisdiction of the court, or for want of proper jurisdictional averments in the petition, and if this was shown, it was ground for refusing the discharge.[76] But the better modern opinion is that, where an adjudication in bankruptcy has been duly made, upon a petition sufficient upon its face, and without any challenge to the jurisdiction of the court, it is final and conclusive, not only in collateral proceedings, but also in the further proceedings in the same case, and if it has not been appealed from, reversed, or set aside, creditors cannot oppose the bankrupt's application for discharge on the ground of an original want of jurisdiction over him.[77] Clearly this cannot be done by a creditor who has recognized the validity of the adjudication by filing and proving his claim, participating in the election of a trustee, and sharing in the distribution of the estate.[78]

[73] In re Shear, 201 Fed. 460, 29 Am. Bankr. Rep. 688; In re George, 1 Low. 409, Fed. Cas. No. 5,325.

[74] Fellows v. Freudenthal, 102 Fed. 731, 4 Am. Bankr. Rep. 490. And see In re Warne, 10 Fed. 377.

[75] In re Miller, 133 Fed. 1017, 13 Am. Bankr. Rep. 345.

[76] In re Groome, 1 Fed. 464; In re Leighton, 4 Ben. 457, 5 N. B. R. 95, Fed. Cas. No. 8,221; In re Beals, 9 Ben. 223, 17 N. B. R. 107, Fed. Cas. No. 1,165; In re Penn, 4 Ben. 99, 3 N. B. R. 582, Fed. Cas. No. 10,926; Stiles v. Lay, 9 Ala. 795.

[77] In re Clisdel, 101 Fed. 246, 4 Am. Bankr. Rep. 95; In re Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Walrath, 175 Fed. 243, 24 Am. Bankr. Rep. 541; In re Ives, 5 Dill. 146, 19 N. B. R. 97, Fed. Cas. No. 7,115. And see In re Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580.

[78] In re Mason, 99 Fed. 256, 3 Am. Bankr. Rep. 599.

§ 668. **Same; Transactions Prior to Enactment of Bankruptcy Law.**—The authorities generally agree that a discharge in bankruptcy cannot be refused on account of acts or omissions occurring, or transactions completed, before the enactment of the bankruptcy law, although the same things would have constituted good grounds of opposition to the discharge if done after the statute came into force, for the contrary construction would give the act an ex post facto operation, or at least make it objectionably retrospective.[79] Thus, for example, the failure of the bankrupt to keep proper books of account or records from which his financial condition could be known, or his wrongful acts in concealing, destroying, or mutilating such books or records, will not warrant the court in refusing to grant him a discharge, unless such omission or offense occurred since the date of the enactment of the bankruptcy law.[80] And whereas the statute (in its original form) required that such omission to keep books or destruction or concealment of books must have been "in contemplation of bankruptcy," the courts held that a debtor cannot be said to be "in contemplation of bankruptcy" at a time when no bankruptcy law is in existence, even though a bill for a bankruptcy statute is then pending before Congress, and the debtor expects to take the benefit of it if it should become a law.[81] But as to the offense of concealing property from his trustee "while a bankrupt," it is held that the act of concealment may be continuous, and that if a concealment of goods or money is begun before the enactment of the bankruptcy law, with intent to defraud creditors, and is continued after the adjudication of bankruptcy, by failure to list it in the schedule or to disclose it to the trustee, it is a concealment from the trustee "while a bankrupt," within the meaning of the statute, and ground for refusing a discharge.[82]

§ 669. **Same; Purchasing Consent of Creditor.**—The bankruptcy act of 1867 provided that a discharge should not be granted "if the bankrupt, or any person in his behalf, has procured the assent of any cred-

[79] In re Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Webb, 98 Fed. 404, 3 Am. Bankr. Rep. 386; Paxton v. Scott, 66 Neb. 385, 92 N. W. 611; Schreck v. Hanlon, 74 Neb. 264, 104 N. W. 193; In re Webb, 2 Nat. Bankr. News, 11; In re Moore, 1 Hask. 134, Fed. Cas. No. 9,751; In re Keefer, 4 N. B. R. 389, Fed. Cas. No. 7,636.

[80] In re Marx, 102 Fed. 676, 4 Am. Bankr. Rep. 521; In re Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Dews, 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Shorer, 96 Fed. 90, 2 Am. Bankr. Rep. 165; In re Stark, 96 Fed. 88, 2 Am. Bankr. Rep. 785; In re Lieber, 2 Nat. Bankr. News, 21; In re Friedberg, 19 N. B. R. 302, Fed. Cas. No. 5,116.

[81] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699.

[82] In re Jacobs & Verstandig, 147 Fed. 797, 17 Am. Bankr. Rep. 470; In re Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274.

itor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation." [83] And it was held that although a creditor thus corruptly influenced was estopped from afterwards setting up the fraud as a ground of opposition to the discharge, yet other creditors, upon learning of the fraud, might object on that ground.[84] The fact of bribery being established, it was no defense to say that the assent of that creditor was altogether unnecessary.[85] A promise by a debtor to pay his creditor "all he ever owed him when he got able," upon condition that he would assent to his discharge in bankruptcy, was held to constitute a pecuniary consideration or obligation sufficient to defeat the right of the bankrupt to be discharged.[86] But the rule did not apply to a payment by the bankrupt of the fees of an attorney and of a notary and the register in making proofs of claims against his estate, though his sole motive in doing so was to obtain the consent of creditors to his discharge.[87]

The present bankruptcy law makes no explicit provision for this case. But it declares that it shall be an offense punishable by imprisonment if any person shall have "received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act," [88] and also that the word "person," "when used with reference to the commission of acts which are herein forbidden, shall include persons who are participants in the forbidden acts." [89] And it is held that, if the bankrupt pays money to a creditor to induce him to forbear opposition to the discharge, or procures the buying up of the creditor's claim for the like purpose, and the creditor knows whence the money comes and its purpose, not only is the creditor guilty of the offense denounced by the statute, but the bankrupt also is guilty as a participant therein, and this is ground for refusing to grant the discharge.[90]

§ 670. **Same; Fraudulent or Preferential Transfers.**—It is ground for refusing to discharge a bankrupt if he shall have, "at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors." [91] As this is in

[83] Rev. Stat. U. S. § 5110, par. 8.
[84] In re Bright, 9 Fed. 491.
[85] In re Douglass, 11 Fed. 403.
[86] In re Ekings, 6 Fed. 170.
[87] In re Svenson, 9 Biss. 69, 19 N. B. R. 229, Fed. Cas. No. 13,659.
[88] Bankruptcy Act 1898, § 29b, cl. 4.
[89] Bankruptcy Act 1898, § 1, cl. 19.
[90] In re Luftig, 162 Fed. 322, 15 Am. Bankr. Rep. 773. And see In re Sanborn, 131 Fed. 397, 12 Am. Bankr. Rep. 428.
[91] Bankruptcy Act 1898, § 14b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797. Though property fraudulently transferred by the bankrupt within the four months' period is subsequently recovered by the trustee, or even surrendered to him on demand, this does not prevent the transfer being urged in opposition to the bankrupt's application for discharge. In re Singer, 251 Fed. 51, 163 C. C. A. 301, 41 Am. Bankr. Rep. 503. On

the nature of a penal enactment, it is to be construed with some strictness. The fact that the bankrupt may have made a fraudulent conveyance of property will not affect his right to a discharge unless it comes strictly within the statute.[92] Thus, the fact of such fraudulent conveyance is immaterial with respect to the bankrupt's discharge unless it was made within the four months before the filing of the petition in bankruptcy,[93] except, perhaps, in the case of an instrument which must be recorded to be effective, and which was recorded within the four months, though executed some time before.[94] Further, there must have been a fraudulent intent on the part of the bankrupt.[95] But an intention to dispose of his property in such a way as to keep it beyond the reach of his creditors is an intention to hinder, delay, and defraud them, and will bar the discharge.[96] But since, under the bankruptcy law, there are substantial differences between a conveyance fraudulent as to creditors and the giving of a preference, voidable though the preference may be, and since this part of the statute speaks only of the former class of transactions, it cannot be extended so widely as to include the latter, and hence a preferential payment or transfer of property, though it may be voidable in the bankruptcy proceedings, will not constitute ground for refusing

the other hand, it is not of importance in this connection that the trustee has not been able, or has not tried, to avoid the transfer. Devorkin v. Security Bank & Trust Co., 243 Fed. 171, 156 C. C. A. 37, 39 Am. Bankr. Rep. 738.

[92] Ashley v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

[93] Gill v. White, 249 Fed. 50, 161 C. C. A. 110, 41 Am. Bankr. Rep. 606; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Schickerling, 204 Fed. 592, 123 C. C. A. 60, 30 Am. Bankr. Rep. 312; In re Jacobs (D. C.) 144 Fed. 868; In re Brumbaugh (D. C.) 128 Fed. 971, 12 Am. Bankr. Rep. 204; In re Wakefield (D. C.) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Hennebry (D. C.) 207 Fed. 882, 31 Am. Bankr. Rep. 231.

[94] In re McKane (D. C.) 155 Fed. 674, 19 Am. Bankr. Rep. 103.

[95] Pirvitz v. Pithan, 194 Fed. 403, 114 C. C. A. 365, 27 Am. Bankr. Rep. 621. Fraudulent intent must have been actual on the part of the bankrupt, and in the absence of evidence of such intent, it is not enough that the transfer may have operated, as a matter of law, to hinder or defraud creditors. In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668. Thus, while a general assignment for the benefit of creditors is an act of bankruptcy, and is a "transfer intended to hinder, delay, or defraud creditors," within the meaning of that section of the Bankruptcy Act which avoids such transfers, yet if it was not made with any improper intent, it is no ground for refusing a discharge. Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57. But an actual fraudulent intent may be inferred from the transfer of valuable property to relatives of the bankrupt for a nominal consideration at a time when the bankrupt was obviously insolvent. In re Singer, 251 Fed. 51, 163 C. C. A. 301, 41 Am. Bankr. Rep. 503.

[96] In re Nelson (D. C.) 179 Fed. 320, 23 Am. Bankr. Rep. 37. A transfer of property by the bankrupt which is simply a device to defeat a landlord's claim for rent is in fraud of creditors and precludes discharge. In re Braus (D. C.) 237 Fed. 139, 38 Am. Bankr. Rep. 109. A discharge may also be refused where the bankrupt, within the four months, sold his entire stock of merchandise, and to avoid complying with the "bulk sales law" of the state, which would have required the filing of a list of his creditors, swore that he had no creditors. In re De Nomme (D. C.) 214 Fed. 671.

the bankrupt's discharge.[97] It is the intent of the debtor that must be looked to, and the fact that the transaction may or may not result in a preference is not controlling. Thus, a transfer of property to one creditor may be ground for refusing a discharge to the bankrupt, where it was made with the avowed purpose of hindering and delaying another creditor and preventing the latter from sharing in it.[98] So, a sale by the bankrupt of all his property, within four months prior to bankruptcy, with a direction that the proceeds shall go to such of his creditors as will agree to a compromise, is in fraud of creditors and bars his right to a discharge.[99] But a sale and transfer by an insolvent partnership of all of its property for its full value, the proceeds being used to discharge its indebtedness so far as possible without preference, is not a transfer to hinder or defraud creditors.[100]

To satisfy the statute, it must appear that the property in question actually belonged to the bankrupt at the time of its transfer, removal, concealment, etc. Thus, where a broker pledges stock which is in his hands, but which belongs to a customer, as security for a loan to himself, it is not a transfer of "his" property with intent to defraud creditors.[101] Again, there must have been an actual transfer or removal.[102] An agreement between a bankrupt and his wife, by which he undertook to transfer certain property to her as a preference, but which was void under the law of the state for want of power in the parties to contract with each other, and which was not accompanied by any actual transfer or removal of the property, which in fact passed into the hands of the trustee in bankruptcy, does not defeat the bankrupt's right to a discharge.[103] And payments made to a creditor from time to time, to enable the bankrupt to continue in business, and to induce the creditor to continue supplying material for the business, and which do not reduce

[97] In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628; In re Friedrich (D. C.) 199 Fed. 193, 28 Am. Bankr. Rep. 656; In re Bouck (D. C.) 199 Fed. 453, 28 Am. Bankr. Rep. 378; In re Battle (D. C.) 154 Fed. 741, 19 Am. Bankr. Rep. 40; In re Maher (D. C.) 144 Fed. 503, 16 Am. Bankr. Rep. 340; In re Steed (D. C.) 107 Fed. 682, 6 Am. Bankr. Rep. 73. See In re Sternburg (D. C.) 249 Fed. 980, 41 Am. Bankr. Rep. 476.

[98] Grafton v. Meikleham, 246 Fed. 737, 159 C. C. A. 39, 40 Am. Bankr. Rep. 433.

[99] In re Julius Bros. (D. C.) 209 Fed. 371, 31 Am. Bankr. Rep. 132.

[100] In re Julius Bros., 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89.

[101] In re Jacob Berry & Co. (D. C.) 146 Fed. 623, 15 Am. Bankr. Rep. 360.

[102] To justify the denial of a discharge to a bankrupt on the ground that he transferred property with intent to delay or defraud creditors, the transfer must have been effective. W. A. Liller Building Co. v. Reynolds, 247 Fed. 90, 159 C. C. A. 308, 40 Am. Bankr. Rep. 371. The deposit by bankrupts of money in bank in their own names cannot be considered such a transfer or concealment of property as to bar their right to discharge. In re Oliner (C. C. A.) 262 Fed. 734, 44 Am. Bankr. Rep. 450, 45 Am. Bankr. Rep. 185.

[103] In re Brown (D. C.) 140 Fed. 383, 15 Am. Bankr. Rep. 350. See In re Hedley, 156 Fed. 314, 19 Am. Bankr. Rep. 409.

the assets available to creditors, are not fraudulent in this sense.[104] And gifts by a bankrupt to his wife and children, previous to the bankruptcy, although they may be voidable by the creditors, do not necessarily warrant the refusal of a discharge.[105] But this is a well-known device of fraudulent bankrupts, which the courts are astute to frustrate. And it may be said generally that where an insolvent debtor, just before his bankruptcy, so manipulates his property as to get it into the possession and apparent ownership of his wife or his children, it is such a fraudulent "transfer" or "concealment" of assets as will prevent him from obtaining a discharge.[106]

The question of the fraudulent character of a given transfer is not always or necessarily to be litigated for the first time on the bankrupt's application for discharge. It may have been tried and determined at an earlier stage of the proceedings, and if so, the decision then made is conclusive.[107] And if rights of third parties, adverse claimants, are involved, it is not proper to attempt their determination in such a collateral proceeding as the statutory hearing on the bankrupt's application to be discharged.[108] On the other hand, the judgment of a state court, in a suit brought by the bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt as fraudulent, is conclusive on the creditors, and they cannot thereafter set up the same transfer as a ground of opposition to the discharge of the bankrupt.[109]

§ 671. **Same; Creation of Fiduciary, Fraudulent, or Tortious Debts.**—It is no ground for refusing a bankrupt's application for discharge that the creditor objecting thereto holds a judgment against him for willful and malicious injury to property, or a claim founded upon the fraud of the bankrupt, or for obtaining property by false pretenses, or for the embezzlement or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity. Such debts, it is true, will not be released by the discharge when granted, but they do not defeat the bankrupt's right to be discharged, as they are not among the enumerated grounds for refusing a discharge.[110] If no claims whatever were filed and proved

[104] In re Maher (D. C.) 144 Fed. 503, 16 Am. Bankr. Rep. 340.

[105] In re Warne (C. C.) 12 Fed. 431.

[106] In re Schenck, 116 Fed. 554, 8 Am. Bankr. Rep. 727; In re Skinner, 97 Fed. 190, 3 Am. Bankr. Rep. 163; In re Kamsler, 97 Fed. 194; In re Eldred, 3 N. B. R. 256, Fed. Cas. No. 4,328.

[107] In re Miller, 135 Fed. 591, 14 Am. Bankr. Rep. 329.

[108] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

[109] In re Tiffany, 147 Fed. 314, 17 Am. Bankr. Rep. 296; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459.

[110] In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Peacock, 101 Fed. 560, 4 Am. Bankr. Rep. 136; In re Gara, 190 Fed. 112, 26 Am. Bankr. Rep. 573; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592; In re Black, 97 Fed. 493; In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Lieber, 2 Nat. Bankr. News, 21; In re Rosenfield, 1 N. B. R. 575, Fed. Cas. No. 12,058; In re Rathbone, 2 Ben. 138, Fed. Cas. No.

against the estate of the bankrupt except such as were clearly excepted from the operation of a discharge, the granting of a discharge could not benefit the bankrupt, and would be an idle formality, and it might be refused for that reason. But if there are any other claims, though they may be inconsiderable in comparison with the non-dischargeable debts, the discharge cannot be withheld.[111] And in a case where the only debt scheduled against the bankrupt was a judgment of a state court, and, as the law then stood, it was doubtful whether or not it would be affected by the discharge, the court held that it had jurisdiction of the bankrupt's application, and would grant him a discharge if he was otherwise entitled to it, leaving the question as to its effect on the judgment to be determined elsewhere and in a more appropriate proceeding.[112]

§ 672. Same; Concealment of Property.—It is made a punishable offense (and therefore a ground for refusing to discharge the bankrupt) if he shall have "concealed, while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy."[113] But there must also have been an actual fraudulent intent on the part of the bankrupt, that is, an intent to conecal the property from the trustee, or to mislead him in regard to it, for the purpose of saving it from the bankruptcy proceedings and enjoying it himself.[114] Though there may have been an actual concealment of property, it is not ground for refusing the discharge if it was not willful but the result of mere accident or mistake.[115] Again, a fraudulent intent alone does not make out the case contemplated by the statute. There must be an actual concealment or withholding of assets of the estate,[116] and there is no concealment when the claim is openly made that the property in question does not belong to the bankrupt but to another.[117] But the forbidden act may include a concealment of the title to property as well as the hid-

11,580; In re Tallman, 2 Ben. 348, Fed. Cas. No. 13,739; In re Elliot, 2 N. B. R. 110, Fed. Cas. No. 4,391; In re Tracy, 2 N. B. R. 298, Fed. Cas. No. 14,124.

111 In re Brumbaugh, 128 Fed. 971, 12 Am. Bankr. Rep. 204.

112 In re Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580.

113 Bankruptcy Act 1898, § 29b. And see In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561.

114 In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709. It is not necessary, in this case, to show an intention to defraud creditors; it is sufficient if an intent to hinder and delay them existed. In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362.

115 In re Conn, 108 Fed. 525, 6 Am. Bankr. Rep. 217; In re De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Boynton, 10 Fed. 277; In re Smith, 1 Woods, 478, 13 N. B. R. 256, Fed. Cas. No. 12,995; In re Scott, 11 Fed. 133.

116 Vehon v. Ullman, 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435. The use by the bankrupt of money taken from the business for his personal expenses, and for the discharge of his individual debts, is not a concealment of assets preventing his discharge. In re Rivas (D. C.) 268 Fed. 690, 45 Am. Bankr. Rep. 434.

117 In re Marsh, 109 Fed. 602, 6 Am. Bankr. Rep. 537. As to concealment of borrowed money, see In re De Mauriac, 206 Fed. 358, 30 Am. Bankr. Rep. 677.

ing from view of the property itself.[118] And although the trustee may have actual knowledge, gained from previous business relations with the bankrupt, that the latter owns certain property which he has not listed in his schedule, it is none the less concealed from the trustee if he does not know where the property is or how to find it.[119] It is also held that the act of concealment may be continuous, and that a bankrupt who hid property from his creditors while insolvent, though more than four months before the filing of the petition, is not entitled to his discharge if he kept the same concealed until after his adjudication.[120] Again, it is necessary that the property concealed should have been property "belonging to his estate in bankruptcy." And hence it is necessary for creditors objecting to the discharge to show that the property in question was of such a character that it would constitute assets of the estate in bankruptcy, that the bankrupt owned it at the time of the adjudication, and that it was then in his possession, or at least that it was then in such a situation that he could have claimed it for himself.[121] Property acquired after the adjudication belongs to the bankrupt and not to the estate, and therefore he is not bound to disclose it.[122] And the concealment of a claim against his wife on account of a gift made to her several years before his bankruptcy, and which was valid as to him and all his creditors except one, who might have maintained a suit to set it aside, is not enough to forfeit the right to a discharge.[123] But on the other hand, where the bankrupt has property in his possession and has the use of it as his own, and willfully omits it from his schedule and keeps it from his trustee, it is no answer to a charge of concealment thereof that the property belonged of right to his assignee under a previous assignment under the state insolvency law.[124] And if the bankrupt was a member of a firm (not in bankruptcy) and has the actual possession of joint estate and the books of the firm, he must disclose them to his individual trustee in bankruptcy.[125] So if he has mingled his own money with funds of an estate of which he is administrator, he must give the bankruptcy court a correct and intelligible account of his affairs, so that it can be deter-

[118] In re Hussman, 2 N. B. R. 437, Fed. Cas. No. 6,951.

[119] In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156.

[120] In re James (C. C. A.) 181 Fed. 476, 24 Am. Bankr. Rep. 288. See In re Frosteg (D. C.) 252 Fed. 199, 42 Am. Bankr. Rep. 275.

[121] Vehon v. Ullman, 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435; In re Isaac Prager & Son, 134 Fed. 1006, 13 Am. Bankr. Rep. 527; In re Fritchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609; In re Locks, 104 Fed. 783, 5 Am. Bankr. Rep. 136; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715. See In re Fleishman, 120 Fed. 960, 9 Am. Bankr. Rep. 557. See In re De Mauriac (D. C.) 206 Fed. 358, 30 Am. Bankr. Rep. 677.

[122] In re Parish, 122 Fed. 553, 10 Am. Bankr. Rep. 548.

[123] In re House, 103 Fed. 616, 4 Am. Bankr. Rep. 603.

[124] In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156.

[125] In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156.

mined what property belongs to the estate in bankruptcy; and until he does this his discharge will be withheld.[126] But if the title to the property in question depends upon the validity of a certain chattel mortgage and its foreclosure, this question will not be determined summarily on the application for discharge, but the discharge will not be granted until it shall have been determined in a proper proceeding.[127] Further, it is necessary that the property should have been concealed from the trustee. And where the bankrupt, after having made up his schedules, delivered his canceled checks to the trustee's son, which placed them at the command of creditors, it was held that he had not concealed them from his trustee.[128] But it is not necessary to constitute the statutory ground for withholding the discharge that the concealment of property should have been successful. It is none the less a concealment though the property is finally discovered by the trustee and recovered for the benefit of the estate.[129] Nor is the bankrupt's offense of concealment condoned by the fact that he lists the property on his schedule after it has been discovered by the trustee or the creditors.[130]

It is further to be understood that the word "concealment" is not to be construed so strictly as to confine it to objects which are physically capable of being hidden or secreted. The bankrupt's interest in a business, his rights under a will or a trust, his interest in an insurance policy, or other choses in action, may constitute assets of his estate. And in regard to such assets, he "conceals" them if he keeps silence in relation to them, omits them from his schedule, and gives false or equivocating evidence concerning them, as, by testifying that they have no existence or that they do not belong to him.[131] But it is not technically a concealment of an asset if the bankrupt lists or discloses it, although he attempts to divert attention from it by pretending that it has only a nominal value, or assigns it a value much below its actual worth in the market.[132] To cover up assets by conducting business in the name of

[126] In re Walther, 95 Fed. 941, 2 Am. Bankr. Rep. 702.

[127] In re Olansky, 163 Fed. 428, 20 Am. Bankr. Rep. 780.

[128] In re Kyte, 174 Fed. 867, 23 Am. Bankr. Rep. 414.

[129] In re Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274.

[130] In re Sussman, 190 Fed. 111, 26 Am. Bankr. Rep. 18.

[131] In re Bacon, 205 Fed. 545, 30 Am. Bankr. Rep. 584; In re Cohen, 201 Fed. 188, 29 Am. Bankr. Rep. 698; In re Towne, 122 Fed. 313, 10 Am. Bankr. Rep. 284; In re Otto, 115 Fed. 860, 8 Am. Bankr. Rep. 305; In re Woods, 98 Fed. 972, 3 Am. Bankr. Rep. 572; In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999. The concealment by the bankrupt, during the four months before the filing of the petition, of the fact that a deed previously executed by him was a mortgage is a concealment of property. In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803. The withholding of a small deposit in a bank from the trustee in bankruptcy is a concealment of property warranting refusal of discharge. In re Smith (D. C.) 232 Fed. 248, 37 Am. Bankr. Rep. 230.

[132] In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729; In re Semmel, 118 Fed. 487, 9 Am. Bankr. Rep. 351.

one's wife, and pretending to act only as her agent or manager, is a favorite device of fraudulent bankrupts, and this will be probed by the courts, and the bankrupt refused his discharge if it is found that he was the real owner of the business.[133] In regard to property conveyed away in fraud of creditors, the question is more difficult. But it may be stated as the general result of the authorities that, in order to establish a concealment of assets such as will defeat the bankrupt's right to a discharge, it must be shown that the property in fact belonged to him at the time of the bankruptcy. And if it had previously been transferred to another, the transfer being actual and not merely colorable and such as to place the property beyond the reach of the bankrupt, the bankrupt's omission of it from his schedule or his denial that he owns it is not a concealment of assets, although the transfer would be voidable at the suit of creditors or of the trustee.[134] But if the pretended transfer was colorable only and not real, and the property continues to be held for the benefit of the bankrupt and subject to his control, or under a secret trust for him, or he retains a secret interest in it or use of it, it continues to be his property in such sense that his failure to disclose it or surrender it to the trustee will constitute a concealment of assets.[135] An amendment to the bankruptcy law, enacted in 1903, makes it a ground for refusing a discharge that the bankrupt has made a transfer of property in fraud of his creditors, if within four months before the filing of the petition, so that, at present, a discharge might be refused on this ground, though the transaction did not constitute a "concealment" of assets.[136] But the two grounds of objection to a discharge are entirely distinct, and allegations of the one would not be supported by proof of the other.

Facts and circumstances showing a fraudulent concealment of assets by a bankrupt, which will defeat his right to a discharge, must be proved and will not be deduced, as a matter of doubtful inference, from

[133] In re Miller, 212 Fed. 920, 129 C. C. A. 440; In re Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Welch, 100 Fed. 65, 3 Am. Bankr. Rep. 93; In re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11,583; In re Hill, 2 Ben. 349, 1 N. B. R. 431, Fed. Cas. No. 6,483; In re Rathbone, 3 Ben. 50, 2 N. B. R. 260, Fed. Cas. No. 11,581.

[134] In re Hammerstein, 189 Fed. 37, 110 C. C. A. 472; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628; In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511, affirming 122 Fed. 688, 10 Am. Bankr. Rep. 527; Fields v. Karter, 115 Fed. 950, 53 C. C. A. 432, 8 Am. Bankr. Rep. 351; In re Wermuth, 179 Fed. 1009, 24 Am. Bankr. Rep. 785.

[135] In re Graves, 189 Fed. 847, 26 Am. Bankr. Rep. 633; Hudson v. Mercantile Nat. Bank, 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432; In re Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362; In re Welch, 100 Fed. 65, 3 Am. Bankr. Rep. 93; In re Holstein, 114 Fed. 794, 8 Am. Bankr. Rep. 147; In re Berner, 2 Nat. Bankr. News, 268; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42.

[136] In re Dauchy, 122 Fed. 688, 10 Am. Bankr. Rep. 527, affirmed 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511.

other facts and circumstances.[137] But it may be stated as a general rule that, where the established facts show a very large shrinkage or disappearance of assets within a short period, such assets being definitely shown to have existed, and the discrepancy being too great to be accounted for by the ordinary vicissitudes of business, it is a fair presumption that the bankrupt is concealing some or all of such assets, and this presumption he must overcome by giving a credible account of the loss or shrinkage, and if he fails to do so, it will be just cause for refusing to discharge him.[138]

§ 673. Same; Omissions in Schedule and List of Creditors.—If a bankrupt knowingly, intentionally, and dishonestly omits from his schedule of assets property which should have been listed therein and turned over to his trustee, and swears to the schedule thus fraudulently incomplete, he is guilty both of concealing property from his trustee and of making a false oath in a proceeding in bankruptcy, and on both grounds forfeits his right to a discharge.[139] This is the case, for example, where he makes a willfully false statement in his schedule that all his property has gone into the possession of a receiver appointed by a state court, when in fact he has property which he did not turn over to the receiver nor list in his schedule.[140] And the fact that the bankrupt amends his schedule and lists the omitted property, after the discovery of the fact that he has concealed assets and made a false oath, will not relieve him from the consequences of his original fault nor entitle him to a discharge.[141] But the rule applies only to the omission

[137] In re Conn, 108 Fed. 525, 6 Am. Bankr. Rep. 217.

[138] In re Coppleman, 207 Fed. 815, 30 Am. Bankr. Rep. 414; In re Loeb, 232 Fed. 601, 146 C. C. A. 559, 36 Am. Bankr. Rep. 768; In re Schwartz, 201 Fed. 166, 28 Am. Bankr. Rep. 670; In re Simon & Sternberg, 151 Fed. 507, 18 Am. Bankr. Rep. 204; In re Jacobs & Verstandig, 147 Fed. 797, 17 Am. Bankr. Rep. 470; In re Boyden, 132 Fed. 991, 13 Am. Bankr. Rep. 269; In re Becker, 112 Fed. 1020, 50 C. C. A. 666; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Cashman, 103 Fed. 67, 4 Am. Bankr. Rep. 326; In re Hoffman, 102 Fed. 979, 4 Am. Bankr. Rep. 331; In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re O'Gara, 97 Fed. 932, 3 Am. Bankr. Rep. 349; In re Grossman, 111 Fed. 507, 6 Am. Bankr. Rep. 510. Compare In re Lesser, 114 Fed. 83, 52 C. C. A. 31, 8 Am. Bankr. Rep. 15. And see In re Allendorf, 129 Fed. 981, 12 Am. Bankr. Rep. 320.

[139] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158, 7 Am. Bankr. Rep. 250; In re McCann, 179 Fed. 575, 24 Am. Bankr. Rep. 789; In re Guilbert, 169 Fed. 149, 22 Am. Bankr. Rep. 221; In re Breiner, 129 Fed. 155, 11 Am. Bankr. Rep. 684; In re Bullwinkle, 111 Fed. 364, 6 Am. Bankr. Rep. 756; In re Semmel, 118 Fed. 487, 9 Am. Bankr. Rep. 351; In re Lowenstein, 106 Fed. 51; In re Lewin, 103 Fed. 852, 4 Am. Bankr. Rep. 636; In re Gammon, 109 Fed. 312, 6 Am. Bankr. Rep. 482; In re Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572; In re Roy, 96 Fed. 400, 3 Am. Bankr. Rep. 37. See In re Opava (D. C.) 235 Fed. 779, 37 Am. Bankr. Rep. 799.

[140] In re Lesser, 108 Fed. 205, 5 Am. Bankr. Rep. 330.

[141] In re Breiner, 129 Fed. 155, 11 Am. Bankr. Rep. 684; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587.

of property in which the creditors can claim an interest or which could be made available for the satisfaction of their claims through the bankruptcy proceedings.[142] And hence it is not ground for denying the discharge that the bankrupt failed to place any valuation on the property which he listed and claimed as exempt,[143] or did not specify a valuable gold watch as included in the "personal wearing apparel" which he claimed to be exempt,[144] or omitted a portion of his monthly salary as a public state officer which was earned but not payable at the time of filing the petition,[145] or property previously transferred by a conveyance which was valid as against him, though it might have been voidable at the suit of creditors,[146] or money which he gave to his wife nine years before,[147] or property which he had previously transferred to a creditor to whom it had been pledged as security for a debt of equal or greater amount.[148] But where the bankrupt omits from his schedule a contract under which he was entitled to receive money, though it was nominally assigned to another, and was in fact assigned to the amount he owed the assignee, it being otherwise treated by the bankrupt, the assignee, and the other party thereto, as the bankrupt's property, this amounts to a false oath and bars his discharge.[149]

Under the former bankruptcy law, it was held to be ground for refusing a discharge if the bankrupt had willfully and fraudulently omitted to include any of his known creditors and their claims in his list of debts,[150] though not so if the omission was not the result of a fraudulent purpose,[151] or if the names of creditors were omitted by their own direction or with their consent.[152] This rule would appear to be equally valid under the present statute, since the bankrupt is explicitly required to file a sworn list of his creditors, and since his intentional omission

[142] In re Winchester, 155 Fed. 505, 19 Am. Bankr. Rep. 227.

[143] In re Reed, 191 Fed. 920, 26 Am. Bankr. Rep. 286. Whether a specific item of property should go to creditors or be reserved by the bankrupt as an exemption is not for the bankrupt to determine, and a bankrupt cannot retain a sum of money as an exemption regardless of the consent of the bankruptcy court. In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587.

[144] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[145] In re Doherty, 135 Fed. 432, 13 Am. Bankr. Rep. 549.

[146] In re Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42. See In re Schroeder (D. C.) 264 Fed. 862, 45 Am. Bankr. Rep. 202; In re Hagy, 220 Fed. 665, 136 C. C. A. 307, 34 Am. Bankr. Rep. 319.

[147] In re Howell, 105 Fed. 594.

[148] In re Webb, 98 Fed. 404, 3 Am. Bankr. Rep. 386.

[149] In re Semmel, 118 Fed. 487, 9 Am. Bankr. Rep. 351.

[150] In re Kallish, Deady, 575, Fed. Cas. No. 7,599; In re Perley, Fed. Cas. No. 10,992; In re Redfield, 2 Ben. 71, Fed. Cas. No. 11,629.

[151] Burnside v. Brigham, 8 Metc. (Mass.) 75; Platt v. Parker, 4 Hun (N. Y.) 135, 13 N. B. R. 14; Knabe v. Hayes, 71 N. C. 109.

[152] In re Needham, 1 Low. 309, 2 N. B. R. 387, Fed. Cas. No. 10,081.

of a creditor from the list would constitute his verification of it the making of a "false oath in a proceeding in bankruptcy."[153] But this has been denied.[154] And it appears that where a proposed voluntary bankrupt, who has no property except such as is exempt, borrows a small sum of money to pay the fees and costs of his attorney, just before filing his petition, he is not required to list the amount so borrowed in his schedule of assets, and his omission to do so is no ground of opposition to his application for discharge.[155]

§ 674. **Same; Knowledge and Fraudulent Purpose.**—The mere fact that the bankrupt omitted from his schedule of assets property which he ought to have listed therein is not alone sufficient to bar his discharge. To constitute such an offense against the bankruptcy law as will warrant the court in refusing him the privilege of a discharge, it must further be made to appear that such omission was made with a clear and definite knowledge on his part of the existence of the property in question, and of the nature of his right to it or interest in it, and for the fraudulent purpose of keeping it from the knowledge of his trustee and the creditors and preventing its administration as a part of his estate in bankruptcy.[156]

§ 675. **Same; Omission by Mistake or by Advice of Counsel.**—The omission of a bankrupt to include particular property in his schedule of assets will not be ground for refusing his application for discharge, where such omission was not caused by a fraudulent intent to conceal the property from his trustee, but was the result of a mistake of law or fact, or of an honest though erroneous belief that he had no available interest in the property.[157] Thus, for example, a discharge should not be refused because the schedule states that the bankrupt owns a half interest in certain property, when the truth is that he has a life interest in the whole of it, where he testifies that he did not

[153] In re Jutkovitz (D. C.) 259 Fed. 915, 44 Am. Bankr. Rep. 231. A discharge in bankruptcy can be denied for a false schedule, which stated the claim of one creditor at a sum much smaller than it actually was. In re Rowe (D. C.) 240 Fed. 165, 39 Am. Bankr. Rep. 461.

[154] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[155] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[156] Smith v. Keegan, 111 Fed. 157, 49 C. C. A. 282, 7 Am. Bankr. Rep. 4; In re Eaton, 110 Fed. 731, 6 Am. Bankr. Rep. 531; In re Slingluff, 105 Fed. 502; Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Marsh, 2 Nat. Bankr. News, 593; In re Parker, 4 Biss. 501, Fed. Cas. No. 10,720; In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Wyatt, 2 N. B. R. 288, Fed. Cas. No. 18,106; In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817; Allen v. Hickling, 11 Ill. App. 549.

[157] In re Opava (D. C.) 235 Fed. 779, 37 Am. Bankr. Rep. 799; In re Morrow, 97 Fed. 574, 3 Am. Bankr. Rep. 263; In

know exactly what his interest was.[158] And bad faith will not be inferred because of slight understatements and overstatements of debts, which practically counteract each other.[159] But the defense or excuse of mistake must be clearly made out, and cannot be accepted in the face of plain facts, where it is incredible that the omission could have been due to inadvertence.[160] It is also permissible for the bankrupt to show, as negativing any fraudulent purpose on his part, that he acted under the advice of his counsel in omitting to list any particular item of property in his schedule.[161] But to excuse the omission on this ground, it is necessary to show that the counsel's advice related to matter of law only, that there was at least some substantial reason in law to question the necessity of including the property in the schedule, that the bankrupt stated all the facts to his attorney fully and fairly, and that the advice was given and accepted in good faith.[162] On similar principles, the bankrupt may be protected by showing that he relied on a ruling or decision of the referee in his own case. Thus, it appeared that the bankrupt was a general insurance agent, and the question was raised whether his interest in renewal premiums under his contract was a part of his estate in bankruptcy. The referee decided that it was not, whereupon the bankrupt proceeded to collect his earned commissions and appropriated the money to his own use. On petition for review, the referee's decision was reversed. But it was held that this was no ground for refusing a discharge to the bankrupt.[163]

§ 676. Same; Omission of Property Without Value.—In pursuance of the same general principle,—that a bankrupt does not forfeit his right to a discharge by omitting property from his schedule, unless it is done knowingly and fraudulently,—he is not to be denied the privilege of a discharge merely on account of the omission of items of prop-

re Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Huber, 1 Nat. Bankr. News, 431; In re Finan, 2 Nat. Bankr. News, 872; In re Boynton, 10 Fed. 277; In re Smith, 1 Woods, 478, 13 N. B. R. 256, Fed. Cas. No. 12,995; In re Scott, 11 Fed. 133; In re Woodward, 8 Ben. 563, Fed. Cas. No. 18,001.

[158] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[159] In re Miner, 114 Fed. 998, 8 Am. Bankr. Rep. 248.

[160] In re Royal, 112 Fed. 135, 7 Am. Bankr. Rep. 106.

[161] Klein v. Powell, 174 Fed. 640, 98 C. C. A. 394, 23 Am. Bankr. Rep. 494; In re Schofield, 147 Fed. 862, 15 Am. Bankr. Rep. 824; In re Neely, 134 Fed. 667, 12 Am. Bankr. Rep. 407; In re Stafford (D. C.) 226 Fed. 127, 35 Am. Bankr. Rep. 747; In re Meikleham (D. C.) 236 Fed. 401, 38 Am. Bankr. Rep. 324.

[162] Remmers v. Merchants' Laclede Nat. Bank, 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78; In re Breitling, 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126; In re Alleman, 162 Fed. 693, 20 Am. Bankr. Rep. 745; In re Stoddart, 114 Fed. 486, 7 Am. Bankr. Rep. 762; In re Berner, 2 Nat. Bankr. News, 268; In re Headley, 2 Nat. Bankr. News, 684.

[163] In re Wright, 177 Fed. 578, 24 Am. Bankr. Rep. 437.

erty which have no value, or could not be made to realize anything for the creditors, or which he honestly believes to be worthless.[164] Thus a concealment of property, or the making of a false oath, is not to be predicated of the omission from the schedule of stock or bonds of an insolvent or dissolved corporation,[165] or of debts due to the bankrupt from persons who cannot be made to pay,[166] or a leasehold interest in realty, under a yearly lease, where there is nothing to show that the use of the property is worth more than the rent,[167] or an option to purchase leased premises under a lease which the bankrupt had surrendered,[168] or a contract to purchase land, on which a payment equal only to the accrued interest had been made, and which the vendor had a right to cancel for non-performance.[169] So, also, it is true that all property of substantial value belonging to the bankrupt should be listed in his schedule, notwithstanding the fact that it is hypothecated or pledged for its full value. But if he omits to list such property, not with any fraudulent intent, but under the honest belief that, being so pledged, it is no longer his, or is not worth including, this is no reason for refusing his discharge.[170] And the bankrupt may easily be excused for failing to list a small sum of money on deposit with a person who has a claim against him of equal or greater amount.[171]

§ 677. **Same; Omission of Doubtful Claims or Assets.**—If the right of the bankrupt to a particular item of property, or his interest in it, depends on the solution of doubtful questions of law, that is, if there is substantial reason in law to doubt whether the property should constitute an asset of his estate in bankruptcy or could be made available for creditors through the medium of the bankruptcy proceedings, and if, for this reason, the bankrupt omits to list it in his schedule, it cannot be said that his purpose in so doing was fraudulent, and therefore he should not be refused his discharge.[172] Thus, where the question whether the

[164] In re Hughes (C. C. A.) 262 Fed. 500, 44 Am. Bankr. Rep. 447; Anderson v. Forest City Nat. Bank, 254 Fed. 793, 166 C. C. A. 239, 42 Am. Bankr. Rep. 423; Baker v. Bishop-Babcock-Becker Co., 220 Fed. 657, 136 C. C. A. 265, 34 Am. Bankr. Rep. 396; In re Le Claire, 124 Fed. 654, 10 Am. Bankr. Rep. 733; In re Dews, 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Bryant, 104 Fed. 789, 5 Am. Bankr. Rep. 114; Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[165] In re McCrea, 161 Fed. 246, 20 Am. Bankr. Rep. 412; In re Eaton, 110 Fed. 733, 6 Am. Bankr. Rep. 531.

[166] In re Pearce, 21 Vt. 611, Fed. Cas. No. 10,873.

[167] In re Hirsch, 97 Fed. 571, 3 Am. Bankr. Rep. 344.

[168] In re Kolster, 146 Fed. 138, 17 Am. Bankr. Rep. 52.

[169] In re Miner, 114 Fed. 998, 8 Am. Bankr. Rep. 248.

[170] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Hamilton, 133 Fed. 823, 13 Am. Bankr. Rep. 333; In re Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696.

[171] In re Miner, 114 Fed. 998, 8 Am. Bankr. Rep. 248.

[172] In re McCrea, 161 Fed. 246, 20 Am.

bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had previously been advised by counsel that he had no interest in such estate on which he could raise money, his failure to schedule such interest as a part of his estate in bankruptcy could not preclude his right to a discharge.[173] In another case, it appeared that a testator bequeathed a sum of money to trustees, in trust to pay the income to his wife during her life, and with power to her to dispose of the principal by will, and added that, in default of such disposition by her, "I give the said trust fund, upon her decease, to my own then surviving next of kin." After the death of the testator, his son was adjudged bankrupt, and thereafter the testator's wife died, having exercised the power of appointment by bequeathing the fund to the bankrupt unconditionally. The bankrupt did not list this property in his schedule of assets, nor offer to surrender it to his trustee. It was held that, in view of the doubtful questions of law, whether the bankrupt's interest in the trust fund at the date of the adjudication was a vested interest such as would pass to his trustee, and whether his title thereto, after his mother's decease, was derived from her will or from the prior will of his father, it could not be said that he had "knowingly and fraudulently" concealed property from his trustee, so as to forfeit his right to a discharge.[174] But on the other hand, where a bankrupt has received a deed purporting to convey an interest in land, and has acted upon it by obtaining a loan secured by a mortgage on such interest, which is outstanding at the time of the adjudication in bankruptcy, he has no right to omit the property or the debt from his schedules on the theory that in fact the conveyance vested no interest in him, that being a matter to be determined by the court; and his entire omission of any mention of the property is ground for refusing to grant him a discharge.[175]

§ 678. Same; False Oath or Testimony; Refusal to Testify.—It is statutory ground for refusing to discharge a bankrupt if he shall have "made a false oath in, or in relation to, any proceeding in bankruptcy." This offense may be committed by his making a material and intentionally false statement in his voluntary petition for adjudication, or in the

Bankr. Rep. 412; In re Brumbaugh, 128 Fed. 971, 12 Am. Bankr. Rep. 204; In re Countryman, 119 Fed. 659, 9 Am. Bankr. Rep. 572; In re Todd, 112 Fed. 315, 7 Am. Bankr. Rep. 770; In re McAdam, 98 Fed. 409, 3 Am. Bankr. Rep. 417; In re Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Webb, 98 Fed. 404, 3 Am. Bankr. Rep. 386; In re Dews, 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Kaufman, 239 Fed. 305, 152 C. C. A. 293, 38 Am. Bankr. Rep. 648.

[173] Woods v. Little, 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742.

[174] In re Wetmore, 99 Fed. 703, 3 Am. Bankr. Rep. 700. And see In re Buchanan, 219 Fed. 492, 135 C. C. A. 204, 33 Am. Bankr. Rep. 638.

[175] In re Galley, 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539.

poverty affidavit accompanying it,[176] or by swearing to a schedule of assets which is false, and known to be so, in respect to particular items of property, or which intentionally omits to mention property which should have been included,[177] or by giving willful false testimony in the course of his examination before the referee, provided the evidence is material and relates to a subject which is a legitimate matter of inquiry on such examination.[178] But it is not enough to justify the refusal of a discharge that the bankrupt's testimony was evasive, misleading, or unsatisfactory, or that his behavior was disrespectful and contumacious.[179] Again, any pleading, verified and filed in the bankruptcy proceeding, may contain such a "false oath" as to forfeit the right to a discharge. But the verification of an answer by the bankrupt containing a false statement of fact, does not constitute the making of a false oath in this sense, where the answer was filed too late and was not in fact considered.[180] It is not entirely clear that perjury committed by the bankrupt on the hearing of his application for discharge will be ground for refusing to grant the discharge, to which he appears otherwise to be entitled. It has been held that this is "making a false oath in a proceeding in bankruptcy," just as much as at any other stage of the case.[181] But in a later case the court felt compelled to grant a discharge to the bankrupt, notwithstanding that he had sworn falsely in his effort to obtain it, while at the same time the court promised to punish him for contempt of court if he attempted to make use of the discharge so obtained.[182]

But in order that false testimony or statements should operate to deprive the bankrupt of his discharge, they must have been made in the same proceeding in which the discharge is sought, that is to say, by the bankrupt in his own bankruptcy case.[183] Hence, where a petition in involuntary bankruptcy was filed against a corporation, and one who was an officer of it and a stockholder in it gave testimony on the hearing of the petition, which was false, and afterwards he was himself adjudged bankrupt, it was held that his right to a discharge was not prejudiced by

[176] See Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[177] In re Herrman, 136 Fed. 767, 69 C. C. A. 413, 13 Am. Bankr. Rep. 778; In re Goodman, 171 Fed. 287, 22 Am. Bankr. Rep. 570; In re Kamsler, 97 Fed. 194; In re Roy, 96 Fed. 400, 3 Am. Bankr. Rep. 37.

[178] In re Luftig, 162 Fed. 322, 15 Am. Bankr. Rep. 773; In re Conroy, 134 Fed. 764, 14 Am. Bankr. Rep. 249; In re Kamsler, 97 Fed. 194; In re Zoffer, 211 Fed. 936, 128 C. C. A. 434.

[179] In re Cohen, 149 Fed. 908, 18 Am. Bankr. Rep. 84; In re Fanning, 155 Fed. 701, 19 Am. Bankr. Rep. 55.

[180] In re Young, 140 Fed. 728, 15 Am. Bankr. Rep. 477.

[181] In re Dews, 101 Fed. 549.

[182] In re Kretsch, 172 Fed. 523, 22 Am. Bankr. Rep. 284.

[183] But see In re Lesser, 234 Fed. 65, 148 C. C. A. 81, 36 Am. Bankr. Rep. 833, in which it is held that a bankrupt who commits perjury in any bankruptcy proceeding, though it be not his own, must be denied his discharge.

such false testimony.[184] For the same reason, testimony given by the bankrupt in prior proceedings under the state insolvency law, even if materially false, cannot prejudice his right to a discharge, and this holds true even where such testimony is read into the record on the bankrupt's examination in the bankruptcy proceedings, where this is done by agreement of counsel, without the concurrence of the bankrupt and without his making any oath in respect to the truth of it.[185] So also the falsity of an oath taken by the bankrupt does not affect his right to a discharge where it was not made in connection with the administration of his estate or in any way affecting such estate,[186] or where the statement was not material to any issue in the bankruptcy proceedings,[187] and the statute cannot be extended so as to embrace previous conduct or transactions which are merely fraudulent as to creditors, but not made criminal.[188]

Further, the oath or testimony of the bankrupt must have been knowingly and fraudulently false.[189] Hence a false statement made by the bankrupt upon his examination, touching the existence of certain books of account, will not prevent his discharge if it appears that such statement was against his own interest, and apparently without motive, and the circumstances indicate that it was innocently and not willfully made.[190] And the false oath must be such as would sustain an indictment for perjury,[191] but if this condition is fulfilled, it is immaterial the bankrupt could not be convicted of perjury, on account of the protection given to him by another provision of the statute.[192] And the objecting creditors must sustain the burden of proving that the oath or statement was not only false, but was knowingly and intentionally so.[193] It ap-

[184] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[185] In re Goldsmith, 101 Fed. 570, 4 Am. Bankr. Rep. 234.

[186] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703.

[187] In re Chamberlain (D. C.) 180 Fed. 304, 25 Am. Bankr. Rep. 37. False and evasive testimony concerning the making of a financial statement to a mercantile agency is not immaterial, but justifies denial of the bankrupt's discharge, although no creditor relied on the statement. In re Sheinberg (D. C.) 223 Fed. 218, 35 Am. Bankr. Rep. 132. On the other hand, the making by a voluntary bankrupt of an oath to his schedules, in which it was stated that he had no property, when in fact he had a small amount of money, with which he paid the costs, and a small amount of household furniture, which he could have claimed as exempt, was not sufficient to constitute a bar to his discharge. Humphries v. Nalley (C. C. A.) 269 Fed. 607, 46 Am. Bankr. Rep. 63.

[188] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

[189] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119; In re Hale, 206 Fed. 856, 31 Am. Bankr. Rep. 88; In re Lundberg (C. C. A.) 272 Fed. 107; In re Wilson (D. C.) 269 Fed. 845, 46 Am. Bankr. Rep. 477.

[190] In re Warne, 12 Fed. 431.

[191] In re Strouse, 2 Nat. Bankr. News, 64.

[192] In re Gaylord, 112 Fed. 668, 50 C. C. A. 415, 7 Am. Bankr. Rep. 1; In re Dow's Estate, 105 Fed. 889, 5 Am. Bankr. Rep. 400; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561. But compare In re Marx, 102 Fed. 676, 4 Am. Bankr. Rep. 521; In re Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525.

[193] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703; In

pears also that a bankrupt's discharge should not be denied because of an alleged false oath, where he corrected his testimony before the close of his examination.[194] But this has been denied.[195]

The act further specifies as a ground for refusing a discharge that the bankrupt has "refused to answer any material question approved by the court." [196] It makes no difference that his refusal to answer was based on a claim of his constitutional privilege against incriminating himself,[197] nor does he regain his right to a discharge by offering to answer the particular question, or by actually answering it, after specifications in opposition to his discharge are filed.[198]

§ 679. **Same; Obtaining Credit by False Statements.**—This ground of objection to a bankrupt's discharge was not included in the bankruptcy act as originally enacted, but was added in 1903 by an amendment, which specified as a ground of refusing a discharge that the bankrupt had "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." [199] This was broadened by a further amendment in 1910, so as to provide that it shall be ground for denying the discharge if the bankrupt shall have "obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." [200] These amendments are retroactive, in so far as that they apply to all cases where the application for discharge was made after the amendment took effect, although the false statement may have been made before.[201] As the law stood between the dates of these two

re Gaylord, 112 Fed. 668, 50 C. C. A. 415, 7 Am. Bankr. Rep. 1; In re Slingluff, 105 Fed. 502; In re Marcus, 203 Fed. 29, 30 Am. Bankr. Rep. 176.

194 In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102.

195 In re Marcus, 192 Fed. 743, 27 Am. Bankr. Rep. 164. In this case it was said by Hand, J.: "I cannot agree with the learned master that it is in the least material that the bankrupt subsequently corrects a false oath by telling the truth, except in so far as it throws light upon what his actual intention or understanding was when he made the first statements. Suppose that the correction had occurred at a separate session of the first meeting of creditors, surely no one would say that such a fact was material. Suppose he first testified falsely, and was afterwards broken down by cross-examination into a confession. Once he has given material testimony, which he intends to have taken as such in the case, and which he knows to be false, the crime is complete, whatever may be his subsequent atonement."

196 See In re Rea Bros. (D. C.) 251 Fed. 431, 40 Am. Bankr. Rep. 429.

197 In re Dresser, 146 Fed. 383, 76 C. C. A. 655, 16 Am. Bankr. Rep. 561; In re Schwartz & Co., 201 Fed. 166, 28 Am. Bankr. Rep. 670.

198 In re Weinreb, 153 Fed. 363, 82 C. C. A. 439, 18 Am. Bankr. Rep. 387; In re Schwartz & Co., 201 Fed. 166, 28 Am. Bankr. Rep. 670.

199 Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 14.

200 Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 14.

201 In re Dresser, 145 Fed. 1021, 74 C. C. A. 680; In re Scott (D. C.) 126 Fed. 981, 11 Am. Bankr. Rep. 327.

amendments, there was some doubt as to whether one borrowing money could be said to "obtain property" on credit,[202] but the obtaining of money is now expressly included.[203] However, it is held that the obtaining of a surety or indemnity bond by means of false financial statements, is not the obtaining of "property" on credit, within the meaning of the law.[204] Although it is not necessary that a statement made by bankrupt to obtain goods on credit should have been made, or the goods delivered, within four months prior to his bankruptcy, in order to bar his discharge,[205] yet it is strictly necessary to show that some one has actually parted with money or property in reliance upon such statement,[206] and the lapse of a considerable period of time may have an important bearing on this point. Thus, a false financial statement, made eighteen months before a sale of goods to the bankrupt, cannot be considered a proximate cause of the sale, so as to entitle the seller to object to the bankrupt's application for discharge on account of it.[207] And a discharge will not be withheld where it is shown that the creditor first refused to make the loan to the bankrupt which the latter asked for, and for which he submitted the alleged false statement, and afterwards made the loan on security given at the time and which he then deemed sufficient.[208]

Within the meaning of the statute, obtaining property "on credit" means obtaining it without present payment, but with a promise on the part of the debtor that payment will be made and an expectation of receiving it on the part of the creditor.[209] And the financial statement presented by the debtor must be the inducement to the extension of credit. It is necessary, therefore, that the creditor should have relied

[202] See In re Louisville National Banking Co., 158 Fed. 403, 85 C. C. A. 513, 19 Am. Bankr. Rep. 309; In re Pfaffinger (D. C.) 154 Fed. 528, 19 Am. Bankr. Rep. 41; In re Gilpin (D. C.) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

[203] Securing the renewal of notes by means of a false statement in writing is held to be "obtaining property" thereby. Samet v. Farmers' & Merchants' Nat. Bank, 247 Fed. 669, 159 C. C. A. 571, 40 Am. Bankr. Rep. 450. So, the obtaining of goods under a contract of conditional sale is an obtaining of property, notwithstanding the seller's reservation of title. In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742.

[204] In re Tanner (D. C.) 192 Fed. 572, 27 Am. Bankr. Rep. 615. The obtaining by bankrupts of a license to do business as private bankers, by means of a false written statement made to the Comptroller of the State of New York, as required by statute, is not an "obtaining of property" within the meaning of the Bankruptcy Act. In re Oliner (C. C. A.) 262 Fed. 734, 44 Am. Bankr. Rep. 450, 45 Am. Bankr. Rep. 185.

[205] In re Simon (D. C.) 201 Fed. 1004, 29 Am. Bankr. Rep. 808.

[206] In re Troutman & Jesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418; In re McLellan (D. C.) 204 Fed. 482, 30 Am. Bankr. Rep. 325.

[207] In re Broverman (D. C.) 199 Fed. 863, 28 Am. Bankr. Rep. 513. And see In re Allendorf (D. C.) 129 Fed. 981, 12 Am. Bankr. Rep. 320; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628. But compare In re Samet (D. C.) 247 Fed. 203, 39 Am. Bankr. Rep. 632.

[208] In re Kaplan (D. C.) 141 Fed. 463, 15 Am. Bankr. Rep. 534.

[209] In re Wylly (D. C.) 210 Fed. 954, 32 Am. Bankr. Rep. 145.

upon it as evidence of the debtor's ability to pay.[210] Thus, where a bank which loans money to a bankrupt on warehouse receipts as collateral would not have done so without a financial statement, which was furnished and which was false, the loan is the extension of a credit on the part of the bank.[211] But the creditor's reliance on the statement made by the debtor need not always be directly proved. It is enough if it is fairly presumable from the circumstances. The fact, for instance, that the creditor wrote the word "caution" on the debtor's statement as a guide to his salesmen and directed that the credit should be limited to a certain small sum does not necessarily save the bankrupt from the consequences of falsity in the statement.[212] And if the creditor did rely on the statement, the question cannot be raised as to whether or not he was justified in so doing; it is immaterial that he might have discovered its falsity by investigating the real estate records.[213] It should be added that this ground of objection to the discharge of a bankrupt is not limited to the case of merchants, but applies to all who ask for a discharge in bankruptcy.[214]

The "false statement in writing" described in the statute must be a financial statement, or statement of the debtor's assets or financial condition, as distinguished from a mere misrepresentation as to a material fact.[215] For this reason, probably, it is held that a check given by the bankrupt in payment for goods, drawn on a bank where he has neither money nor credit, is not such a "statement" as the law intends, and further, that the "credit" meant is express credit, and not such unintended credit as is forced upon a seller who accepts a worthless check.[216] On the other hand, a bankrupt's statement that he has a certain amount of money invested is a statement of fact, and not a mere representation nor an estimate of value, and if it was made for the purpose, and with the result, of obtaining credit, it is ground for denying his discharge.[217]

In regard to the untruthfulness of the statement, it is said that the word "false," as used in the statute means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and hence such a statement, in order to constitute a bar to

[210] Rauch v. Manchester-Smith Co., 240 Fed. 687, 153 C. C. A. 485, 39 Am. Bankr. Rep. 484; Bank of Commerce & Savings v. Matthews, 257 Fed. 292, 168 C. C. A. 376, 43 Am. Bankr. Rep. 284.

[211] In re Savarese, 209 Fed. 830, 126 C. C. A. 554, 31 Am. Bankr. Rep. 758.

[212] In re Neuman (D. C.) 251 Fed. 667, 40 Am. Bankr. Rep. 427.

[213] In re Blank (D. C.) 236 Fed. 801, 38 Am. Bankr. Rep. 71.

[214] In re Day (D. C.) 268 Fed. 871, 46 Am. Bankr. Rep. 394.

[215] In re Morgan (C. C. A.) 267 Fed. 959, 45 Am. Bankr. Rep. 612.

[216] In re Rea Bros. (D. C.) 251 Fed. 431, 40 Am. Bankr. Rep. 429; Robinson v. J. R. Williston & Co. (C. C. A.) 266 Fed. 970, 45 Am. Bankr. Rep. 619. See In re Robinson (D. C.) 256 Fed. 55, 43 Am. Bankr. Rep. 64.

[217] In re Simon (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

a discharge, must have been knowingly and intentionally untrue,[218] or it must have been either knowingly false, or made so recklessly as to warrant a finding that the bankrupt acted fraudulently in making it.[219] But there are decisions that if the statement was made for the purpose of obtaining credit and brought about that result, and was false in fact, it is none the less a bar to the bankrupt's discharge because the inaccuracy was due to a mistake made in good faith,[220] or because it was made and given as a mere matter of form and with no actual intention to defraud.[221] The false statement must have been made by the bankrupt, but need not be in his writing. It is equally effective to bar his discharge where the paper was filled out by a representative of the creditor from figures given by the bankrupt.[222] And where one member of a firm makes a materially false statement of its assets and liabilities, for the purpose of obtaining credit, this will prevent the discharge of that partner and also of the firm, though probably not of an innocent partner.[223] And although cases must be rare in which the bankrupt would make a materially false statement for the purpose of obtaining money or property for any one else than himself, yet it is said that the effect on

[218] Doyle v. First Nat. Bank of Baltimore, 231 Fed. 649, 145 C. C. A. 535, 36 Am. Bankr. Rep. 331; Aller-Wilmes Jewelry Co. v. Osborn, 231 Fed. 907, 146 C. C. A. 103, 36 Am. Bankr. Rep. 714; In re Lundberg (C. C. A.) 272 Fed. 107; In re Rosenfeld (C. C. A.) 262 Fed. 876, 44 Am. Bankr. Rep. 390; In re Goldberg (D. C.) 256 Fed. 541, 43 Am. Bankr. Rep. 127; In re Kemp (D. C.) 255 Fed. 125, 42 Am. Bankr. Rep. 417; Franklin v. Monning Dry Goods Co., 217 Fed. 929, 133 C. C. A. 601, 33 Am. Bankr. Rep. 257; Gilpin v. Merchants' Nat. Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, 21 Am. Bankr. Rep. 429; Hamlin v. J. M. Radford Grocery Co. (Tex. Civ. App.) 182 S. W. 716. The intent to deceive being an essential ingredient of this ground of objection to the bankrupt's discharge, his signing as president statements of the financial condition of a corporation, wholly relying on the advice of his financial adviser, will not have that effect. In re Stafford (D. C.) 226 Fed. 127, 35 Am. Bankr. Rep. 747. But it is enough to show that the untruthfulness in the statement related to a subject within the knowledge of the bankrupt. In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362. The falsity in the statement, however, must have been material and not trifling. In re Kerner, 250 Fed. 993, 163 C. C. A. 243, 41 Am. Bankr. Rep. 507.

[219] In re Collins (D. C.) 157 Fed. 120, 19 Am. Bankr. Rep. 688.

[220] In re Aldridge, 168 Fed. 93; In re Shaffer, 169 Fed. 724, 22 Am. Bankr. Rep. 147. And see In re Matthews (C. C. A.) 272 Fed. 263, 47 Am. Bankr. Rep. 38.

[221] In re Arenson, 195 Fed. 609, 28 Am. Bankr. Rep. 113; In re Terens, 172 Fed. 938, 22 Am. Bankr. Rep. 895.

[222] In re Puschkin, 183 Fed. 882, 25 Am. Bankr. Rep. 742. But where a bankrupt made a full disclosure of his financial condition to an objecting creditor's agent, and depended on him to enter the facts according to the disclosure, and signed the statement so made without reading it, it was not "false" so as to bar the bankrupt's discharge, though it was inaccurate. International Harvester Co. v. Carlson, 217 Fed. 736, 133 C. C. A. 430, 33 Am. Bankr. Rep. 178.

[223] Ragan, Malone & Co. v. Cotton & Preston, 200 Fed. 546, 118 C. C. A. 640, 29 Am. Bankr. Rep. 597; In re Neyland & McKeithen, 184 Fed. 144, 24 Am. Bankr. Rep. 879; In re Josephson (D. C.) 229 Fed. 272, 36 Am. Bankr. Rep. 505. See In re Waite (D. C.) 223 Fed. 853, 35 Am. Bankr. Rep. 189.

his right to a discharge is not different because the credit was obtained by a corporation of which he owned a majority of the stock.[224]

In its original form, this clause of the statute required the statement to have been made "to such person," that is, the person who was thereby induced to furnish the credit. The amendment of 1910 changed this so as to read "to any person or his representative." But even before 1910, it was held that the statement was made "to such person" if it was given to an agent for the purpose of using it in obtaining property for the bankrupt and if its contents were communicated by the agent to such person.[225] But a financial statement made by the bankrupt to a mercantile or commercial agency, in response to its request therefor or in answer to its inquiries, though materially false, is not a bar to his discharge, where creditors merely relied on his rating thus obtained and furnished him goods on credit, but without direct communication with the bankrupt himself.[226] "Ordinarily statements are given by merchants to commercial agencies to continue a business rating, and are regarded merely as a basis for continued credit, and not as a medium through which particular credit is given or obtained, and in such a case, even when the statement is false, the bankrupt is not debarred from a discharge in bankruptcy."[227] But such a statement, made to a commercial agency, reciting that it is made as a basis for credit with the associate members of such agency, and which is communicated to members, who extend credit on the faith of it, is equivalent to one made directly to them.[228] And the result is the same where the bankrupt having made such a statement to a mercantile agency, refers to it in his application for credit with a particular creditor, and is granted credit in reliance on it.[229]

[224] In re Dresser, 145 Fed. 1021, 74 C. C. A. 680, affirming 144 Fed. 318, 13 Am. Bankr. Rep. 616; In re Bleyer (D. C.) 210 Fed. 391, 32 Am. Bankr. Rep. 98. And see In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362.

[225] In re Dresser, 146 Fed. 383, 76 C. C. A. 655, 16 Am. Bankr. Rep. 561.

[226] In re Russell, 176 Fed. 253, 100 C. C. A. 77, 23 Am. Bankr. Rep. 850; Novick v. E. P. Reed & Co., 192 Fed. 20, 28 Am. Bankr. Rep. 521; In re Foster, 186 Fed. 254, 24 Am. Bankr. Rep. 368; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; J. W. Ould Co. v. Davis, 246 Fed. 228, 158 C. C. A. 388, 40 Am. Bankr. Rep. 185; In re Kretz (D. C.) 212 Fed. 784, 32 Am. Bankr. Rep. 365; In re Zoffer, 211 Fed. 936, 128 C. C. A. 434.

[227] In re Simon, 201 Fed. 1004, 29 Am. Bankr. Rep. 805.

[228] In re Cloutier Bros. (D. C.) 228 Fed. 569, 36 Am. Bankr. Rep. 319; In re Pincus (D. C.) 147 Fed. 621, 17 Am. Bankr. Rep. 331. Whether false statements to a mercantile agency, subsequently communicated and acted upon, bar a discharge depends on whether the agency was the creditor's representative when the statement was acted on and whether the false statement was still in force. Haimowich v. Mandel, 243 Fed. 338, 156 C. C. A. 118, 39 Am. Bankr. Rep. 513.

[229] In re Haimowich (D. C.) 232 Fed. 378, 36 Am. Bankr. Rep. 648; In re Kyte (D. C.) 174 Fed. 867, 23 Am. Bankr. Rep. 414. An objecting creditor cannot set up the claim that he relied on false statements as to the bankrupt's financial condition made by the bankrupt to a commercial agency three months after

In regard to the substance of the statement, the falsity of it may consist in a claim of assets which are purely imaginary, or which, though real, are not the property of the bankrupt.[230] Thus, false statements by a broker as to the amount of stock on hand for customers who are trading on margin, pursuant to which customers made payment, will preclude his discharge.[231] And a materially false statement made by a bankrupt as to the solvency of a corporation of which he was president, on the faith of which he obtained a large sum of money from a bank on the notes of the corporation indorsed by himself, the proceeds of which he used for his own purposes, will be a sufficient objection to his application for discharge.[232] But the giving by a bankrupt of a mortgage on property which he does not own, to secure a note for borrowed money, has been held not within the statute.[233] The falsity of the statement may also consist in a gross overestimate of the value of land or other property which the bankrupt really owns,[234] or in the omission, concealment, or understatement of his debts.[235] And a bankrupt's written statement of his financial condition, from which liabilities are omitted, cannot be defended on the ground that assets were also omitted and that the balance was therefore substantially correct.[236] Neither can the omission of liabilities from such a statement be defended on the ground that the bankrupt thought his creditors would not press him, nor is it cured by the subsequent payment or release of the debts which were concealed.[237] But a discharge will not be refused on this ground where the statement did not on its face purport to include all the bankrupt's indebtedness and did not state that there was no other indebtedness.[238] Nor will a discharge be refused on account of the bankrupt's having omitted, in such a statement, debts due to some of his relatives, for money loaned to him, where the agreement with them was that such loans were not to be paid back if the bankrupt was unable to repay them, and that they were not to interfere with the claims of his other

the goods were sold and the credit extended. In re Main (D. C.) 205 Fed. 421, 30 Am. Bankr. Rep. 547.

[230] In re Nadel (D. C.) 211 Fed. 767, 33 Am. Bankr. Rep. 727; In re Goodhile (D. C.) 130 Fed. 782, 12 Am. Bankr. Rep. 380.

[231] In re Shea (D. C.) 245 Fed. 363, 40 Am. Bankr. Rep. 175.

[232] In re Bleyer, 215 Fed. 896, 132 C. C. A. 236, 33 Am. Bankr. Rep. 76.

[233] In re Hudson (D. C.) 262 Fed. 778, 45 Am. Bankr. Rep. 275.

[234] In re Ellerbee (D. C.) 198 Fed. 952, 29 Am. Bankr. Rep. 87.

[235] In re Smith (D. C.) 232 Fed. 248, 37 Am. Bankr. Rep. 230; Cleland v. Iowa Loan & Trust Co., 260 Fed. 653, 171 C. C. A. 417, 44 Am. Bankr. Rep. 429; In re Miller (D. C.) 192 Fed. 730, 27 Am. Bankr. Rep. 606; In re Augspurger (D. C.) 181 Fed. 174, 25 Am. Bankr. Rep. 83; In re Brener (D. C.) 166 Fed. 930, 20 Am. Bankr. Rep. 644.

[236] In re Maaget (D. C.) 245 Fed. 804, 40 Am. Bankr. Rep. 221; In re Reed (D. C.) 256 Fed. 412, 43 Am. Bankr. Rep. 132.

[237] Josephs v. Powell & Campbell, 213 Fed. 627, 130 C. C. A. 291, 32 Am. Bankr. Rep. 222.

[238] In re Rammage (D. C.) 260 Fed. 893.

creditors. In such a case, decision on the application for discharge may be postponed, and if the relatives will refrain from proving their claims as debts, and will give the bankrupt a release or waiver of them, the discharge may be granted.[239] And where two bankers in the same town are in the habit of "clearing" or settling their accounts against each other at the close of each day's business, the debtor bank for the day giving a draft on a third bank, and numbers of such drafts drawn by one of the bankers (the bankrupt in this case) have been provided for, although he had no funds in the hands of the drawee at the time of making the drafts, the fact that the last two drafts, so drawn while he was insolvent, are dishonored, does not make them "materially false statements in writing" given for the purpose of obtaining property on credit.[240] Finally, if it is clearly shown that any one of the items in the bankrupt's financial statement was materially false, though others may be open to dispute or question, or may be successfully defended, it is the plain duty of the court to refuse a discharge.[241]

§ 680. Same; Failure to Keep Books of Account.—The bankruptcy act, as amended in 1903, provides that it shall be a ground for refusing a discharge, if the bankrupt has "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." This does not require that the bankrupt shall have kept books of account. He may be entitled to his discharge though he has nothing whatever to show in the way of account books or records. To bar his discharge it is necessary that his omission to keep accounts should have resulted from a wish to conceal his financial condition from his creditors and in pursuance of an intent so to do.[242] Thus, the fact that he kept no books of account will not warrant the court in refusing him a discharge, where the business in which he was engaged was such that ordinarily books of account would not be kept,[243] or where he was an employé and not engaged in any business of his own,[244] or where, for several years before, he had not been engaged in any business in which the keeping of books would be necessary or appropriate.[245] So, where the bankrupt was a farmer and not a business man, and showed entire willingness to give evidence as to facts and transactions alleged to constitute a concealment

[239] In re Josephs (D. C.) 205 Fed. 548, 30 Am. Bankr. Rep. 586.

[240] Firestone v. Harvey, 174 Fed. 574, 98 C. C. A. 420, 23 Am. Bankr. Rep. 468.

[241] In re Darevski (D. C.) 171 Fed. 288, 22 Am. Bankr. Rep. 571.

[242] In re Brockman, 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Keefer, 135 Fed. 885; In re Josephson (D. C.) 229 Fed. 272, 36 Am. Bankr. Rep. 505.

[243] In re Corn, 106 Fed. 143, 5 Am. Bankr. Rep. 478; In re Opava (D. C.) 235 Fed. 779, 37 Am. Bankr. Rep. 799.

[244] In re McCrea, 161 Fed. 246, 20 Am. Bankr. Rep. 412.

[245] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

of assets, it was considered that a fraudulent intent could not be imputed to him from his mere failure to keep any books.[246] And this "intent to conceal" his financial condition is not shown as to a building contractor, where, during the ten years he had been engaged in the business, he never had kept any books at all.[247] Further, the failure to keep proper books of account in a business which had been entirely closed out before the bankruptcy, there being no debts or assets arising out of such business, will not prevent a discharge.[248] But in this situation, the bankrupt must show that everything in relation to the discontinued business had been so fully ended that no account therein can in any way affect the interests of his creditors at the time of his bankruptcy.[249]

But assuming the other conditions to exist, the failure to keep books need not have been systematic, but may have been occasional; and the failure to enter one particular transaction on the books may constitute a failure to "keep" proper books. Thus, for example, the sale of firm assets to a new firm composed of the same members and one other, without any entry of the transaction on the books of the old firm, is a violation of the act.[250] And so where the bankrupt fails to enter on his books a transfer of property made about the time when his affairs became embarrassed,[251] or a transfer of his business to his wife, which is thereafter supposed to be continued by her, but with no visible difference in the conduct of it,[252] or a sale of his stock of goods in bulk for about half its cost and under circumstances indicating haste and secrecy.[253] So the prohibition of the statute must be applied where the bankrupt mingled his wife's money and his own and deposited it all in a bank in his wife's name, and kept no account or record to show how much of it was his,[254] and where there was a very great shrinkage of the bankrupt's assets, and his books entirely failed to show what had become of his property.[255] But the mere fact that the partners in the bankrupt firm sometimes drew out for personal use equal sums, without entering the same on the books, is not enough to show an inten-

[246] In re Marsh, 2 Nat. Bankr. News, 593.

[247] In re Tanner, 192 Fed. 572, 27 Am. Bankr. Rep. 615; In re Arnold (D. C.) 228 Fed. 75, 35 Am. Bankr. Rep. 740.

[248] In re Friedberg, 19 N. B. R. 302, Fed. Cas. No. 5,116; In re Keach, 1 Low. 335, 3 N. B. R. 13, Fed. Cas. No. 7,629.

[249] Tyler v. Angevine, 15 Blatchf. 536, Fed. Cas. No. 14,306.

[250] In re Colcord, 2 Hask. 455, Fed. Cas. No. 2,970a.

[251] In re Grieves, Fed. Cas. No. 5,809. See In re Sims (D. C.) 213 Fed. 992, 32 Am. Bankr. Rep. 564.

[252] In re Bemis, 104 Fed. 672, 5 Am. Bankr. Rep. 36.

[253] In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402.

[254] Bragassa v. St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700.

[255] In re Brod, 166 Fed. 1011, 21 Am. Bankr. Rep. 426, affirmed Brod v. J. K. Orr Shoe Co., 173 Fed. 1019, 97 C. C. A. 667.

tion to conceal their financial condition.[256] And a merely temporary and accidental omission in good faith and for a reasonable time to make the proper entries would not be a failure to keep the books, although a cessation to keep them, on purpose, or for an unreasonable length of time, would be.[257]

Of course it is not necessary for the bankrupt to keep the books with his own hand. In one case, a discharge was granted to a bankrupt who could neither read nor write English, though he kept no books but a cash book and a check book, in which the entries were made by a young woman clerk who could not be located as a witness.[258] On the other hand, it is doubtful if the bankrupt can excuse himself for the inaccurate or unintelligible condition of his books, by showing that he left the entire charge of them to a bookkeeper whom he believed to be competent.[259] In one case it was said: "The law does not require traders to keep a bookkeeper, but to keep books, and they are responsible to see that it is done."[260] But a bankrupt residing in New York, and being a member of a firm doing business in Michigan, is not prevented from obtaining his discharge either by the failure of the firm to keep proper books of account or by his neglect to see that proper books were kept.[261] But where the bankrupt did business through a corporation which he owned and controlled, his failure to keep books, either individually or through the corporation, so as to show his business transactions, will constitute a good objection to his discharge.[262]

§ 681. Same; Destruction, Mutilation, or Concealment of Books.—Destruction or concealment of books of account, to constitute ground of objection to a bankrupt's discharge, must appear to have been done by the bankrupt himself, or at least with his knowledge and connivance.[263] Thus, a bankrupt's discharge will not be barred by the fact that the account books of a corporation for which he was bookkeeper, and in which he had no interest, had been mutilated before they came into the possession of the corporation.[264] But where a debtor has keep books of account or records of his business carried on before the enactment of the bankruptcy law, their destruction or concealment, after the passage of

[256] In re Mackenzie, 132 Fed. 114, 12 Am. Bankr. Rep. 605.

[257] In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999; In re Burgess, 3 N. B. R. 196, Fed. Cas. No. 2,153.

[258] In re Mintzer, 197 Fed. 647, 28 Am. Bankr. Rep. 743.

[259] See In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

[260] In re Hammond, 1 Low, 381, 3 N. B. R. 273, Fed. Cas. No. 5,999.

[261] In re Garrison, 149 Fed. 178, 79 C. C. A. 126, 17 Am. Bankr. Rep. 831.

[262] In re Berger, 200 Fed. 325, 29 Am. Bankr. Rep. 712.

[263] In re Brice, 102 Fed. 114, 4 Am. Bankr. Rep. 355.

[264] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703.

the act, will be ground for refusing his discharge, if done with the fraudulent intent denounced by the statute.[265]

The mutilation of books of account, either by tearing out leaves or by changing the entries, may constitute a "destruction" or a "concealment" of them, according to the circumstances.[266] But such a mutilation may be explained, and condoned if done without any fraudulent intent.[267] Thus, where it appears that certain erasures in the bankrupt's books arose from errors in the original entries, which were corrected by erasing the figures and substituting the correct ones therefor, and there was no suggestion of a fraudulent intent, a discharge will not be refused because of such erasures.[268]

If the bankrupt testifies that he does not know where his books of account are, when they are in fact in the custody of one of his creditors, where he knows them to be and where he has access to them, he is guilty of concealing them,[269] as also where he first denies having kept any books, and then, when investigation has shown their existence, produces only one, and that not the most important.[270] Bankrupts, however, usually profess ignorance as to what has become of their books, at least if they have not been produced and turned over to the trustee at once; and if such ignorance really exists, it negatives a fraudulent purpose of concealing them. The plausibility of such an excuse must depend on many surrounding circumstances. In one case a discharge was granted where the testimony of the bankrupt was that, at the time of his failure, thinking the books were of no further value to him, and having no place to keep them, he left them lying in the store and supposed they had been lost or mislaid in some way unknown to him;[271] and so in another case, where the books were in a safe in the store when the sheriff levied, and the bankrupt said he had never seen the books since and did not know what had become of them;[272] and in another case, where the books had been turned over to a brother-in-law when the latter bought the business, and no effort was made to call him as a witness or require the production of the books.[273] But a discharge was refused in a case where the books were needed to explain a large shrinkage of assets, and the bankrupts had

[265] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[266] In re Mendelsohn, 102 Fed. 119, 4 Am. Bankr. Rep. 103.

[267] In re Nooman, 3 N. B. R. 267, Fed. Cas. No. 10,291.

[268] In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490. And see In re Rivas (D. C.) 268 Fed. 690, 45 Am. Bankr. Rep. 434.

[269] In re Kamsler, 97 Fed. 194. And see In re Simon (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

[270] In re McBachron, 116 Fed. 783, 8 Am. Bankr. Rep. 732.

[271] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[272] In re Stark, 96 Fed. 88, 2 Am. Bankr. Rep. 785.

[273] In re Shorer, 96 Fed. 90, 2 Am. Bankr. Rep. 165.

turned them over to a creditor along with the stock in the store, on a bill of sale, but never went back for the books nor made any effort to recover them;[274] and in a case where the bankrupt testified that his wife had kept the books, but that they could not now be found.[275]

Almost any records which might serve to show the financial condition of the bankrupt are to be considered "books or records" within the prohibition against their destruction or concealment. Thus, where the bankrupt kept no proper books of account, but did keep a bank account, his canceled checks and the stubs in his check book constitute records from which his financial condition could to some extent at least be ascertained; and his destruction of such records shortly before his bankruptcy, and while he was insolvent, no adequate reason being shown therefor, may be held to have been with intent to conceal his financial condition, and be ground for refusing a discharge.[276] And a similar ruling was made in a case where the bankrupt had kept no accounts at all but certain loose memoranda of sales, and had destroyed these.[277]

§ 682. Same; Intent to Conceal Financial Condition.—Under the bankruptcy act of 1867, it was not necessary that the bankrupt's omission to keep proper books of account should have been willful or fraudulent, in order to bar his discharge; the intent was immaterial; the mere omission was the thing forbidden.[278] But the present statute provides that the discharge may be refused on this ground only when the failure to keep books, or their destruction or concealment, was "with intent to conceal his financial condition," in this respect following the English law, whereby an intent on the part of the bankrupt to conceal the true state of his affairs must be coupled with the willful omission to keep proper books. As the act of 1898 stood originally, it required that this intent should have been "fraudulent" and "in contemplation of bankruptcy." But the words quoted were stricken out by the amendment of 1903, so that, at present, if there was an intent to conceal his financial condition, it is not necessary to show that it was fraudulent.[279] This

[274] In re Ablowich, 99 Fed. 81, 3 Am. Bankr. Rep. 586.

[275] In re Wiedmann, 188 Fed. 684, 26 Am. Bankr. Rep. 697.

[276] In re Hodge, 205 Fed. 824, 30 Am. Bankr. Rep. 522. But compare In re Studebaker, 127 Fed. 951, 62 C. C. A. 583, 11 Am. Bankr. Rep. 384. Proof that the bankrupt destroyed his canceled checks and stubs in cleaning out his safe, after turning his business over to his principal creditor, but that thereafter he and his attorney stood ready to produce all books required by the trustee, does not show an intent to conceal his financial condition, which would be necessary to prevent his discharge for the destruction of the checks. In re Rivas (D. C.) 268 Fed. 690, 45 Am. Bankr. Rep. 434.

[277] In re Hirshowitz, 194 Fed. 562, 27 Am. Bankr. Rep. 701.

[278] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175; In re Solomon, 6 Phila. (Pa.) 481, 2 N. B. R. 285, Fed. Cas. No 13,167; In re Archenbrown, 12 N. B. R. 17, Fed. Cas. No. 505.

[279] In re Hodge, 205 Fed. 824, 30 Am.

intent, however, is an indispensable requisite to successful opposition to the discharge. The mere failure of the bankrupt to keep any books is not enough.[280] Nor is it enough to show that the books have disappeared,[281] or that they were kept in a negligent or careless manner,[282] or that the true state of the bankrupt's affairs or his real financial condition cannot be ascertained from the books as kept.[283] It is further necessary to show that the failure to keep books, or their destruction or concealment, or the manner of keeping them resulted from the bankrupt's intention to use this means of concealing his financial condition.[284] And the exact intention on the part of the bankrupt is important. Where a transaction alleged to have been fraudulent was fully entered on the books, although the entries were made to deceive the general creditors, yet if they were not made with an intent to falsify the books, the particular intention denounced by the statute is not present.[285] But conversely, if the bankrupt meant to conceal his financial condition, and for that reason kept no books, it is immaterial what the actual effect on creditors may have been.[286]

The objecting creditors must assume the burden of proving this intent on the part of the bankrupt.[287] Naturally the mental state involved in the harboring of an intent is not susceptible of proof by direct evidence, unless it may be by the bankrupt's own admissions,[288] as appeared in one case where the bankrupt deposited his money in his wife's name and made no entry on his own books, and admitted that he did this to keep his creditors from "jumping on it" before he had an opportunity to use it.[289] But proof of various circumstances supporting the hypothesis that he entertained such an intent, or all pointing to such an intent as the

Bankr. Rep. 522; In re Hanna, 168 Fed. 238, 21 Am. Bankr. Rep. 843; In re Linker (D. C.) 222 Fed. 173, 33 Am. Bankr. Rep. 709. See In re Helfgott (D. C.) 245 Fed. 358, 40 Am. Bankr. Rep. 196.

[280] In re Brown, 199 Fed. 356, 29 Am. Bankr. Rep. 73; Sherwood Shoe Co. v. Wix, 240 Fed. 692, 153 C. C. A. 490, 38 Am. Bankr. Rep. 670; In re Newbury & Dunham, 209 Fed. 195, 126 C. C. A. 207, 31 Am. Bankr. Rep. 365.

[281] In re Philipps, 98 Fed. 844, 3 Am. Bankr. Rep. 542.

[282] In re Haskell, 164 Fed. 301, 20 Am. Bankr. Rep. 914; In re Wix (D. C.) 236 Fed. 262, 38 Am. Bankr. Rep. 185.

[283] In re Brice, 102 Fed. 114, 4 Am. Bankr. Rep. 355; In re Lafleche, 109 Fed. 307, 6 Am. Bankr. Rep. 483; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

[284] Van Ingen v. Schophofen, 129 Fed. 352, 64 C. C. A. 22, 12 Am. Bankr. Rep. 24; In re Allendorf, 129 Fed. 981, 12 Am. Bankr. Rep. 320; In re Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Spear, 103 Fed. 779, 4 Am. Bankr. Rep. 617; In re Boasberg, 1 Nat. Bankr. News, 133.

[285] In re Hamilton, 133 Fed. 823, 13 Am. Bankr. Rep. 333.

[286] In re Schachter, 170 Fed. 683, 22 Am. Bankr. Rep. 389.

[287] In re Forth, 151 Fed. 951, 18 Am. Bankr. Rep. 186; In re Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; In re Finan, 2 Nat. Bankr. News, 872.

[288] In re Feldstein, 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

[289] In re Bragasa, 2 Nat. Bankr. News, 837.

only explanation of his conduct, will raise a presumption that such an intent existed, and this will justify the refusal of a discharge, unless the facts are satisfactorily explained by the bankrupt.[290] Such explanations are often attempted by bankrupts, and have sometimes passed muster. In one case, the bankrupt was a dealer in pianos, and his books showed all receipts from customers who had taken pianos on lease or conditional sale or time sales, but not receipts for pianos sold for cash. His explanation was that he did not want his salesmen to know that he was selling pianos at cost for cash, and it was held that no "intent to conceal his financial condition" had been established, for concealment can exist only when it obtains with reference to persons entitled to know the facts.[291] So it was held a reasonable excuse for failure to enter certain loans on the bankrupt's books that he was afraid that, if the objecting creditor knew that he got money outside, he would close him up, whereas the bankrupt hoped that he could work along from season to season and eventually pay his debts.[292] And so in a case where it appeared that the bankrupt had not kept such books or records as would be sufficient to disclose his true financial condition, but that his system or method of keeping his accounts, incomplete and insufficient as it was, had been persisted in by him during the whole time he had been in business (about nine years) and had not been in any respect changed after the passage of the present bankruptcy act.[293] On the other hand, a bankrupt is not entitled to a discharge where he admittedly destroyed his books of account with intent to conceal the record of his business, though he testified that his motive was to destroy evidence that might have been used in a criminal prosecution against him for violating a state statute.[294] It is also proper to refuse a discharge where the bankrupt

[290] In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Weston, 206 Fed. 281, 124 C. C. A. 345, 30 Am. Bankr. Rep. 647; In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. Rep. 404; McKibbon, Driscoll & Dorsey v. Haskell, 198 Fed. 639, 117 C. C. A. 343, 28 Am. Bankr. Rep. 588; In re Alvord (D. C.) 135 Fed. 236, 14 Am. Bankr. Rep. 264; In re Feldstein (D. C.) 108 Fed. 794, 6 Am. Bankr. Rep. 458; In re Studebaker (D. C.) 124 Fed. 945, 10 Am. Bankr. Rep 205; In re Kenyon (D. C.) 112 Fed. 658, 7 Am. Bankr. Rep. 527; In re Cashman (D. C.) 103 Fed. 67, 4 Am. Bankr. Rep. 326; In re Morgan (D. C.) 101 Fed. 982, 4 Am. Bankr. Rep. 402. A bankrupt who conducted an extensive boot and shoe business, and whose stock in trade exceeded $10,000, must, where he failed to keep books of account or records showing an account of stock, liabilities, and assets, be deemed to have intended to conceal his financial condition, so that a discharge should be denied. In re Amster (D. C.) 249 Fed. 256, 41 Am. Bankr. Rep. 249.

[291] In re Barthier (D. C.) 188 Fed. 394, 33 Am. Bankr. Rep. 900. But where a bankrupt kept books until he became financially involved, and then omitted entries for the admitted purpose of concealing his condition from his employés, it may properly be inferred that he also intended concealment from his creditors. In re Harrell (D. C.) 263 Fed. 954, 45 Am. Bankr. Rep. 37.

[292] Van Ingen v. Schophofen, 129 Fed. 352, 64 C. C. A. 22, 12 Am. Bankr. Rep. 24.

[293] In re Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741.

[294] In re Wolf, 156 Fed. 543, 19 Am. Bankr. Rep. 70.

concealed or destroyed his books in order to thwart an investigation into his financial condition,[295] or where he destroyed them when he was preparing to file a petition in bankruptcy, and the books were material to a proper understanding of the state of his affairs.[296] And his omission to make proper entries on the books is not excused by his saying that he thought it unnecessary for his creditors to know that he was getting money from his wife.[297]

§ 683. **Same; Contemplation of Bankruptcy.**—In its original form the bankruptcy act of 1898 provided that the failure to keep books of account or records, or their destruction or concealment, should be ground for refusing the bankrupt's discharge only in case such acts or omissions on his part were "in contemplation of bankruptcy." And it was held that this meant contemplation, on the part of a debtor, of filing his voluntary petition in bankruptcy, or of involuntary bankruptcy proceedings being taken against him by his creditors for some act which the statute makes an act of bankruptcy; and that the phrase did not mean merely contemplation of a state of insolvency.[298] And since there could be no contemplation of bankruptcy, in this sense, at a time when no bankruptcy law was in existence, such acts or omissions were no ground for refusing to discharge the bankrupt when occurring before the enactment of the statute.[299] But these words were stricken out by the amendment of 1903, and are therefore no longer of importance.[300]

§ 684. **Same; What are Proper Books of Account.**—The question, whether or not the bankrupt has kept proper books of account, is in every case a question of evidence, and it depends largely upon the nature and extent of the business which he has carried on.[301] The test is this: If a competent accountant can, from an examination of the books produced and in the possession of the trustee, determine the true financial condition of the debtor, they are sufficient to justify granting him a discharge.[302] The law does not require that the bankrupt

[295] Ablowich v. Stursberg, 105 Fed. 751, 45 C. C. A. 31, 5 Am. Bankr. Rep. 403.

[296] In re Conley, 120 Fed. 42, 9 Am. Bankr. Rep. 496.

[297] In re Koelle, 171 Fed. 257, 22 Am. Bankr. Rep. 515.

[298] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re Bamberger, 2 Nat. Bankr. News, 95; In re Stark, 1 Nat. Bankr. News, 232. See In re Feldstein, 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

[299] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600.

[300] Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 14b.

[301] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175.

[302] In re Gay, 1 Hask. 108, Fed. Cas. No. 5,279; In re Bellis, 4 Ben. 53, Fed.

shall have kept any particular kind of books, or that his books shall have been kept according to any special mode or system of bookkeeping, or in the most scientific and approved manner, but only that they shall disclose his financial condition.[303] As remarked in one case, "in construing this statute, courts deal with both the creditor and the bankrupt in the light of the character of the business of the bankrupt. Some unfortunate debtors are illiterate and whose business has been such as the court would not expect accounts of to be kept. In other cases account books are required, but not with the formality or precision that business men of experience would keep. There is and can be no hard and fast rule upon the question as to the precise kind of account books that must be kept and produced. * * * Books of account, however crudely kept, but kept with honesty and presented to the trustee and referee would have been a solution of the entire situation."[304] Thus, where bankrupt stockbrokers kept certain individual accounts of customers in their general ledger by number, instead of by the name of the customer, but also kept other records, such as letters of instruction or powers of attorney, from which such accounts might be readily identified, it cannot be said that they had failed to keep books of account from which their financial condition could be ascertained.[305] In another case, a bankrupt's stock consisted in part of a stock of goods which he had brought over from a former business, and the partners in the new business being unable to agree on the discount to be made from the cost price, the items of such stock were valued at cost and set down in lead pencil in the inventory, so that by making a proper discount from the items so entered, the exact status of the firm at any particular time could be determined. It was held that the failure to take stock and inventory the value of all the assets at the end of each year did not show that the firm's books were improperly kept for the purpose of concealing its financial condition.[306] It may be said further that casual mistakes in the books will not prevent the granting of a discharge,[307] nor the fact that the books, having been in charge of a competent bookkeeper, were inaccurate on account of mis-

Cas. No. 1,275; In re Schumpert, Fed. Cas. No. 12,491; In re Bartenback, Fed. Cas. No. 1,068; In re Vernia, 5 Fed. 723; In re Frey, 9 Fed. 376; In re Graves, 24 Fed. 550; In re Simon, 201 Fed. 1004, 29 Am. Bankr. Rep. 808.

[303] In re Simon, 201 Fed. 1004, 29 Am. Bankr. Rep. 808; In re Frey, 9 Fed. 376; In re Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741; In re Chamberlain, 125 Fed. 629, 11 Am. Bankr. Rep. 95; In re McCarthy, Fed. Cas. No. 8,680.

[304] Baylor v. Rawlings, 200 Fed. 131, 118 C. C. A. 305, 28 Am. Bankr. Rep. 773.

[305] In re A. O. Brown & Co. (C. C. A.) 204 Fed. 63, 30 Am. Bankr. Rep. 305.

[306] In re Marcus, 203 Fed. 29, 30 Am. Bankr. Rep. 176.

[307] In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17,885.

understanding, inadvertence, or mistakes,[308] nor on account of obscurities which need explanation, when they are in fact explained.[309] But if the books are unintelligible, and the intent to conceal is made out, a discharge cannot be granted to the bankrupt.[310]

It was said above that the law does not require the keeping of any particular kind of books. There are certain books which are almost invariably kept, and regarded as indispensable, in all well-conducted business. Yet the absence of any one of these may be pardoned, if the necessary information, that is, the true financial condition of the bankrupt, can be ascertained from other existing books or records. Thus, generally, a tradesman must keep an invoice or stock book.[311] But the want of an invoice book will not prevent his discharge where he has so preserved his invoice bills that a complete account of all goods received by him can be made out from them[312] So, failure to keep a cash book may be fatal to the application for discharge, if the consequence is that it is impossible to determine the state of the bankrupt's affairs,[313] but not where cash receipts and payments may be shown from other books,[314] as from a bank book and an account book of receipts and expenditures.[315] The "blottter" may become an important or even an indispensable book, as where the latest sales of goods were entered on it, but not posted up in the journal and ledger.[316] And books showing only the aggregate monthly purchases and sales are not proper books of account.[317] And so, where the books of a firm doing an extensive business do not show the state of accounts between the partners, they are not entitled to a discharge.[318] A custom of keeping no proper books, but making entries of various transactions on as many slips of paper, which are not elsewhere recorded or otherwise co-ordinated, has generally been regarded as not enough to satisfy the statute.[319] But a mere pocket memorandum book may be a sufficient "record" to disclose the bankrupt's financial condition,[320] though not if it is so loosely kept that he himself cannot tell from it the amount of his

[308] In re Marcus, 203 Fed. 29, 30 Am. Bankr. Rep. 176.

[309] In re Townsend, 2 Fed. 559.

[310] In re Mackay, 4 N. B. R. 66, Fed. Cas. No. 8,837.

[311] In re White, 2 N. B. R. 590, Fed. Cas. No. 17,532.

[312] In re Reed, 12 N. B. R. 390, Fed. Cas. No. 11,639.

[313] In re Bellis, 4 Ben. 53, 3 N. B. R 496, Fed. Cas. No. 1,275.

[314] In re Hannahs, 8 Ben. 475, Fed. Cas. No. 6,032.

[315] In re Marsh, 19 N. B. R. 297, Fed. Cas. No. 9,109.

[316] Longis v. Creditors, 20 La. Ann. 15.

[317] In re Anketell, 19 N. B. R. 268, Fed. Cas. No. 394.

[318] In re Jorey, 2 Bond, 336, 2 N. B. R. 668, Fed. Cas. No. 7,530.

[319] In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999; In re Perry, Fed. Cas. No. 10,999; In re Bamberger, 2 Nat. Bankr. News, 95; In re Hunt, 26 Fed. 739.

[320] In re Howard, 180 Fed. 399, 103 C. C. A. 545, 24 Am. Bankr. Rep. 841.

business or the particulars of his debts.[321] And the practice of entering transactions of a particular kind only in a private memorandum book, always carried by the bankrupt himself and shown to no one, is evidence of an intent to conceal his financial condition.[322]

§ 685. Time of Application for Discharge.—A bankrupt may file his application for discharge "after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt"; and "if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."[323] As to the earliest permissible time for filing the application, it has been ruled that "one month" means one calendar month, to be computed by excluding the first day and including the last, so that if the adjudication was made on March 7th, an application filed on April 7th would be premature.[324] As to the limitation of twelve months, this gives the bankrupt a year and a day from the date of adjudication, and no longer, unless the time is extended by the judge for cause shown as above stated.[325] But one additional day may be added where the last day of the twelve months is a public holiday.[326] The court, however, has no power to open an adjudication entered on default in involuntary proceedings, and make a new one, to permit the bankrupt to file an application for discharge, which he neglected to do within the time prescribed.[327] It is no part of the referee's duty to notify the bankrupt or his attorney of the time when the application may be filed or of the expiration of the year for filing it; the bankrupt himself must take notice of these matters.[328] And the limitation of the statute is impera-

[321] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175; In re Garrison, 5 Ben. 430, 7 N. B. R. 287, Fed. Cas. No. 5,254.

[322] In re Pomerantz & Hopkins, 168 Fed. 444, 21 Am. Bankr. Rep. 857; In re Feldstein, 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

[323] Bankruptcy Act 1898, § 14a.

[324] In re Goldberg, 1 Nat. Bankr. News, 266. "Adjudication," with respect to time, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed. Bankruptcy Act 1898, § 1, cl. 2. An objection by a creditor that the petition for discharge was prematurely filed cannot be waived by him, since the court is bound, for the protection of all the creditors, to see that all the statutory conditions of granting the discharge are fulfilled. In re Wheeler, 5 Fed. 299.

[325] In re Holmes, 165 Fed. 225, 21 Am. Bankr. Rep. 339. But there are decisions holding that the "next twelve months" begin to run, not from the date of the adjudication, but from the expiration of the one month. In re Walters (D. C.) 209 Fed. 133, 31 Am. Bankr. Rep. 565; In re Jacobs, 241 Fed. 620, 154 C. C. A. 378, 39 Am. Bankr. Rep. 385.

[326] In re Lang, 2 N. B. R. 480, Fed. Cas. No. 8,056; In re De Lewandowski (D. C.) 243 Fed. 787, 39 Am. Bankr. Rep. 804.

[327] In re Morse, 168 Fed. 157, 21 Am. Bankr. Rep. 709.

[328] In re Knauer, 133 Fed. 805, 13 Am. Bankr. Rep. 503.

tive and not merely directory. If the twelve months have expired without the filing of an application (saving the case where the bankrupt was "unavoidably prevented" from acting in time), it is not within the discretion or authority of the court to entertain the application or to grant a discharge, but its jurisdiction and authority in this particular are at an end.[329] And a bankrupt who has failed to apply for his discharge within the time limited cannot thereafter file a second petition in bankruptcy, and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy.[330]

After the expiration of the twelve months, the bankrupt has no absolute right to apply for a discharge, but he may be allowed to do so within the next six months, by an order of court, based on a petition to the judge for leave to file such application, accompanied by satisfactory evidence that the bankrupt was unavoidably prevented from making his application within the year.[331] But this petition must absolutely be presented before the end of the additional six months; if not, the court has no jurisdiction to act upon it.[332] And not merely must the application be so filed, but it is also imperative that the necessary showing should be made and leave of court obtained to file it before the six months run out. In one case, the bankrupt filed his application sixteen months after the adjudication, but without obtaining leave to do so and without showing cause excusing his delay. Afterwards, but more than eighteen months after the adjudication, he presented a verified petition setting forth the reasons for his delay, and praying for leave to file his application, and that the order granting such leave might be entered nunc pro tunc as of the date when the application was originally presented. But his petition was denied, on the ground that the failure seasonably to obtain leave to file the application was attributa-

[329] In re Knauer, 133 Fed. 805, 13 Am. Bankr. Rep. 503; In re Sloan, 13 Blatchf. 67, 12 N. B. R. 59, Fed. Cas. No. 12,945; In re Wilmott, 2 N. B. R. 214, Fed. Cas. No. 17,778; In re Greenfield, 2 N. B. R. 298, Fed. Cas. No. 5,774; In re Martin, 2 N. B. R. 548, Fed. Cas. No. 9,153; In re Schenck, 5 N. B. R. 93, Fed. Cas. No. 12,447; In re Barrett, 11 N. B. R. 527, Fed. Cas. No. 1,044. See In re Canady, 2 Biss. 75, 3 N. B. R. 11, Fed. Cas. No. 2,377.

[330] In re Silverman, 157 Fed. 675, 19 Am. Bankr. Rep. 460; In re Loughran, 218 Fed. 619, 134 C. C. A. 377, 33 Am. Bankr. Rep. 350.

[331] In re Wolff, 100 Fed. 430, 4 Am. Bankr. Rep. 74. See In re Donaldson, 2 Dill. 546, 11 N. B. R. 460, Fed. Cas. No. 3,982; In re Lowenstein, 3 Dill. 145, 13 N. B. R. 479, Fed. Cas. No. 8,573. The court, for cause shown, may extend the time within which an application for a discharge may be filed by the administrator of a bankrupt dying pending the bankruptcy proceedings. In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709.

[332] In re Levenstein, 180 Fed. 957, 24 Am. Bankr. Rep. 822; In re Wagner, 139 Fed. 87, 15 Am. Bankr. Rep. 100; In re Fahy, 116 Fed. 239, 8 Am. Bankr. Rep. 354; In re Schwartz (D. C.) 248 Fed. 841, 41 Am. Bankr. Rep. 246; In re Snell (D. C.) 244 Fed. 613, 40 Am. Bankr. Rep. 356; In re Taunton (D. C.) 216 Fed.

ble to the laches of the party and not to the act of the court.[333] A petition of this kind, if filed in due season, is addressed to the discretion of the court, and therefore notice to creditors is not required, unless the judge shall direct that notice be given, and then its terms and time are within his own judgment.[334] As to what circumstances are sufficient to show that the bankrupt was "unavoidably prevented" from filing his application within the regular time, it is in the power of the court to give a liberal construction to the phrase quoted.[335] Thus, where the delay in filing an application for discharge was due to the fault of a clerk or other employee of the bankrupt's attorney, or to the fault of employees in the postal service, a nunc pro tunc order allowing the filing of the application may be made.[336] So, where bankrupt's counsel delayed more than a year in filing his petition for discharge, under the belief that certain proceedings in a state court should first be terminated.[337]

It should also be noted that the Soldiers' and Sailors' Civil Relief Act, March 8, 1918, c. 20, § 205, authorized the suspension or stay of all civil proceedings, until the termination of the war then in progress, against persons in the military service of the United States. It is probable that this would authorize the suspension of bankruptcy proceedings against a person in the military service, or authorize the court to receive his application for discharge in bankruptcy after the termination of the war, or after his return from the service, without reference to the limitation of time in the bankruptcy act. But in a case where it was shown, not that the bankrupt himself had entered the military service, but that his attorney had done so, and that the latter had turned over the case to another attorney, who neglected to file the application for discharge until more than 18 months after the adjudication, it was held that these facts did not vest the court with jurisdiction to entertain the application.[338]

But in ordinary circumstances and conditions it should be remembered that the law allows the bankrupt eleven months in which to make his application, and that a discharge in bankruptcy is a great privilege, mercifully allowed by the law, but wholly for his own benefit. It is therefore not too much to expect that he should pay keen attention to

987, 33 Am. Bankr. Rep. 308; In re De Lewandowski (D. C.) 243 Fed. 787, 39 Am. Bankr. Rep. 804.

[333] In re Wolff, 100 Fed. 430, 4 Am. Bankr. Rep. 74.

[334] In re Churchill, 197 Fed. 111, 28 Am. Bankr. Rep. 607; In re Chase, 186 Fed. 408, 26 Am. Bankr. Rep. 456; In re Fritz, 173 Fed. 560, 23 Am. Bankr. Rep. 84.

[335] In re Churchill, 197 Fed. 111, 28 Am. Bankr. Rep. 607; In re Waller, 249 Fed. 187, 161 C. C. A. 223, 41 Am. Bankr. Rep. 314.

[336] In re Daly (D. C.) 224 Fed. 263, 35 Am. Bankr. Rep. 219.

[337] In re Swain (D. C.) 243 Fed. 781, 39 Am. Bankr. Rep. 841.

[338] In re Weldon (D. C.) 262 Fed. 828, 45 Am. Bankr. Rep. 196.

his rights in this particular, and that causes preventing him from acting within the allotted time should be very serious indeed. It has been ruled that nothing can be considered sufficient cause for delay which could have been avoided by ordinary diligence and attention on his part, where he was informed by his attorney of the time when he must file his application and had plenty of time to prepare.[339] Where the bankrupt or members of his family were sick and he had no money to pay for preparing his application for discharge, this may be an acceptable excuse for delay beyond the year allowed,[340] but not where it appears that there was nothing to prevent his attorney from preparing the petition for his signature and verification within the appointed time,[341] and merely to say that the necessity of filing the petition was overlooked owing to press of business is no excuse at all.[342] And where the fact is such that, if the bankrupt had applied for his discharge within the twelve months, it would necessarily have been refused, because of his discharge in voluntary proceedings within six years previously, this fact does not "unavoidably prevent" him from taking action within the twelve months, and therefore does not justify an extension of time until after the six-year period shall have expired.[343] If the court grants an extension of time on an insufficient showing, creditors may move to vacate the order.[344] But no question of this kind can be raised on the hearing of the application for discharge. In other words, when leave to file the application out of time has been granted, and the order has not been vacated or withdrawn, its propriety is judicially settled, and when the application comes on for hearing, creditors can oppose the discharge only on the statutory grounds.[345]

§ 686. Petition for Discharge.—"The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt."[346] But if it is defective, either in respect to the allegations of fact or the prayer for relief, the court may permit its amendment.[347] Thus, where one member of a bankrupt firm desires to apply separately for his discharge, the petition therefor should recite the ad-

[339] In re Daly (D. C.) 205 Fed. 1002, 30 Am. Bankr. Rep. 475.

[340] In re Casey, 195 Fed. 322, 28 Am. Bankr. Rep. 359.

[341] In re Lewin, 135 Fed. 252, 14 Am. Bankr. Rep. 358.

[342] In re Anderson, 134 Fed. 319, 14 Am. Bankr. Rep. 221; In re Daly (D. C.) 205 Fed. 1002, 30 Am. Bankr. Rep. 475.

[343] In re Vaine, 186 Fed. 535; In re Chase, 186 Fed. 408, 26 Am. Bankr. Rep. 456.

[344] In re Haynes & Sons, 122 Fed. 560, 10 Am. Bankr. Rep. 13; In re Maier (D. C.) 256 Fed. 60, 43 Am. Bankr. Rep. 509.

[345] In re Haynes & Sons, 122 Fed. 560, 10 Am. Bankr. Rep. 13.

[346] General Order No. 31. For the form for a petition for discharge, see Official Form No. 57.

[347] In re Kaufman, 136 Fed. 262, 14 Am. Bankr. Rep. 393.

judication of the firm and of the petitioner as a member of it, and should pray for a discharge from both firm and individual debts,[348] but if faulty in these particulars, it may be made right by amendment.[349] The petition for discharge should be considered as a pleading, within the meaning of the bankruptcy law and therefore should be verified under oath, but if no objection to a want of verification is made until after the evidence on the application has been heard before the referee, it will then be too late.[350] As the petition is addressed to the judge, and is a matter for his personal consideration, it must be filed with the clerk of the court, and not with the referee.[351] But in a case where the application, although erroneously filed with the referee in the first place, instead of the clerk, was, with the other proceedings thereon before the referee, filed with the clerk within a year after the adjudication, and no objection had been taken by creditors to the improper original filing with the referee, it was held that the petition would be regarded as properly filed.[352]

§ 687. Notice of Application for Discharge.—The law provides that the creditors shall have thirty days' notice by mail of the bankrupt's application for discharge.[353] Compliance with this requirement is essential to the validity of the discharge, and it is so far jurisdictional that no petition for discharge will be considered without proof that the prescribed notice has been given.[354] And since the referee has no power to hear applications for discharge, the notice to creditors must be on the order of the court, in accordance with the official form (No. 57); but the referee has power to call a meeting of creditors for the purpose of authorizing the trustee to file objections, and may give the notices for this purpose.[355] The official forms evidently intend that the notice shall both be published in a newspaper and mailed to creditors whose addresses are known. For the latter purpose, a notice printed on the back of a postal card and duly mailed will be sufficient.[356] While the notice should contain all that the law and the official form prescribe, it

[348] In re Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260.

[349] In re Morrison, 127 Fed. 186, 11 Am. Bankr. Rep. 498; In re Bidwell, 2 N. B. R. 229, Fed. Cas. No. 1,392.

[350] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143.

[351] In re Hockman, 205 Fed. 330, 30 Am. Bankr. Rep. 921; In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143; but see In re Pincus, 147 Fed. 621, 17 Am. Bankr. Rep. 331.

[352] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143.

[353] Bankruptcy Act 1898, § 58a, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[354] In re Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; In re Langfeldt (D. C.) 253 Fed. 458, 41 Am. Bankr. Rep. 586.

[355] In re Hockman, 205 Fed. 330, 30 Am. Bankr. Rep. 921.

[356] In re Downing, 199 Fed. 329, 28 Am. Bankr. Rep. 778.

is not improper to add to it (for the purpose of saving expense) a notice of a meeting of creditors for the purpose of examining the bankrupt.[357] The notice by mail should be given to all creditors who have proved their debts, or whose names are included by the bankrupt in his schedule of creditors,[358] but if no proofs of claims have been filed, and no assets have come into the hands of the trustee, notice may be by publication only.[359] But this course is not proper where there are known creditors, unless the bankrupt shows that the addresses of such creditors are unknown to him and cannot be ascertained after diligent search and inquiry.[360] But notice sent by mail to a judgment creditor, directed to his address as known at the beginning of the bankruptcy proceedings, will be sufficient, although the creditor has died in the mean time, at least if the will has not been admitted to probate and no steps have been taken to substitute the executor as a creditor in the bankruptcy.[361]

§ 688. **Proceedings in Opposition to Discharge.**—The General Orders in bankruptcy provide that "a creditor opposing the application of a bankrupt for his discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."[362] Under this provision the judge may, in his discretion, extend the time for entering an appearance, as well as the time for filing specifications, and may grant leave to do so after the time has expired as well as before; but the creditor has no right to enter an appearance after the return day, and generally should not be allowed to do so except for good cause shown excusing his delay.[363] Creditors who do thus appear and filed objections on the merits to the granting of a discharge thereby waive objections to any error or irregularity in the granting of

[357] In re Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419.

[358] In re McIntire, 1 Ben. 543, Fed. Cas. No. 8,822. Where a creditor objecting to the bankrupt's discharge has died, notice of the hearing should be given to his attorney, to his widow or her attorney, and to his children or next of kin. In re Blaesser (D. C.) 230 Fed. 528, 36 Am. Bankr. Rep. 795.

[359] Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457.

[360] In re Dvorak, 107 Fed. 76, 6 Am. Bankr. Rep. 66.

[361] Lent v. Farnsworth, 180 N. Y. 503, 72 N. E. 1144.

[362] General Order in Bankruptcy No. 32. See In re Braun, 1 Ben. 274, 1 N. B. R. 5, Fed. Cas. No. 1,116, as to entering appearance and filing specifications before the return day. Objections to the bankrupt's discharge must be filed with the clerk of the bankruptcy court, and not with the referee. In re C. H. Kendrick & Co. (D. C.) 226 Fed. 980, 35 Am. Bankr. Rep. 630. Objections to a bankrupt's discharge constitute the beginning of a new suit or action, the hearing of which is in effect a trial in equity. In re Malschick (D. C.) 217 Fed. 492, 33 Am. Bankr. Rep. 214.

[363] In re Levin, 176 Fed. 177, 99 C. C. A. 531, 23 Am. Bankr. Rep. 845; In re Ginsburg, 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Chase, 186 Fed. 408, 26 Am. Bankr. Rep. 456; In re Grant, 135 Fed. 889, 14 Am. Bankr. Rep. 398.

an extension of time for filing the petition for discharge.[364] But on the other hand, a creditor who does not enter his appearance at the time specified (or within a further time granted to him by the court, as above stated) has no standing in court on the hearing of the petition for discharge, and cannot be heard in opposition to it, but on the contrary will be understood as assenting to it.[365] The entry of an appearance by one or more creditors for the purpose of opposing the application for discharge suspends all further proceedings until the filing of the specifications; but if the specifications are not filed within the ten days (or within an extension of the time specially granted by the court), then the case proceeds as if no opposition had been entered.[366] But one creditor may adopt and prosecute the objections filed by another creditor, when the latter has declared his intention to abandon the same,[367] though not after the claim of the creditor originally objecting has been stricken out.[368] And the fact that creditors, who proposed to contest the granting of a discharge on the ground that the bankrupt has defrauded them, have abandoned their opposition is entitled to consideration by the court.[369]

§ 689. Withdrawal of Opposition.—A creditor who has entered opposition to the bankrupt's application for discharge may withdraw the same without the consent of the other creditors,[370] but not without notice to other creditors who have adopted the specifications as representing their own objections and are proposing to prosecute them.[371] Or when a creditor who has filed specifications of objection is about to withdraw them, other creditors may be substituted and carry on the opposition.[372] But the law frowns severely upon any attempt to induce a creditor to withdraw his opposition, for the sake of a pecuniary advantage or benefit to himself. Any agreement or arrangement by which a creditor is to be paid in full, on consideration of his withdrawing opposition to the discharge, or is to receive a larger share of his debt than other creditors, or to receive other property or a bonus or present, is corrupt, illegal, and contrary to public policy, and cannot be enforced in any form

[364] In re Churchill, 197 Fed. 111, 28 Am. Bankr. Rep. 607.

[365] In re Sutherland, Deady, 573, Fed. Cas. No. 13,640; In re Smith, 5 N. B. R. 20, Fed. Cas. No. 12,985; In re Seabury, 10 N. B. R. 90, Fed. Cas. No. 12,573; In re Schuyler, 3 Ben. 200, 2 N. B. R. 549, Fed. Cas. No. 12,494.

[366] In re McVey, 2 N. B. R. 257, Fed. Cas. No. 8,932; In re Frizelle, 5 N. B. R. 119, Fed. Cas. No. 5,132.

[367] In re Guilbert, 154 Fed. 676, 18 Am. Bankr. Rep. 830.

[368] In re McDonald, 14 N. B. R. 477, Fed. Cas. No. 8,753.

[369] In re Hammerstein, 189 Fed. 37, 110 C. C. A. 472, 26 Am. Bankr. Rep. 757.

[370] Brangan v. His Creditors, 64 Cal. 394, 1 Pac. 477.

[371] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316.

[372] In re Houghton, 2 Low. 328, 10 N. B. R. 337, Fed. Cas. No. 6,730.

of proceeding.[373] If a promissory note is given to the creditor in pursuance of such an agreement, it is invalid and cannot be collected by law.[374] If the consideration is the bankrupt's promise to pay him in full, no action can be maintained on such promise.[375] So where the bankrupt's wife executes a mortgage on her separate property, at his request, in pursuance of an agreement by which he was to pay the debt of his creditor in full if the latter would assent to his discharge, the mortgage is without consideration and tainted with the illegality of the transaction, notwithstanding it was executed after the discharge and though the wife did not know of the agreement.[376] A corrupt bargain of this sort will also invalidate the discharge, if granted, or at least it will constitute sufficient ground for revoking and annulling it.[377] And so strictly is the rule applied that it has been held ground for vacating a discharge that a creditor's withdrawal from opposition was purchased, though it was done by a friend of the bankrupt, without the procurement or participation of the bankrupt, where the latter was privy to the arrangement and consented to it.[378] But in a case where a surety of the bankrupt paid the debt of a creditor who was opposing the discharge, merely for his own purposes, and because the granting of the discharge would put him (the surety) in a better position, and this was done without consulting with the bankrupt or informing him of the transaction until long afterwards, and the latter had no part in it nor made any promise to repay the amount, it was held that this would not vitiate the discharge.[379]

§ 690. **Want or Failure of Opposition.**—The court will not refuse to discharge the bankrupt unless creditors appear in opposition to the discharge, file written specifications sufficiently alleging the grounds of their opposition, and sustain the burden of proving the grounds specified. The formal prerequisites to a discharge having been complied with, the judge will not, of his own motion, seek out grounds for refusing to discharge the bankrupt or consider objections not specified. Hence if the specifications filed are found in favor of the bankrupt, or are withdrawn, or are ruled out because the creditor is estopped to allege the particular matter, or if none are filed, the court will not refuse a discharge, ex proprio motu, although it may appear that the bankrupt has committed some act which would deprive him of the right to a discharge if properly specified.[380] And where there is no opposing party to the discharge, the

[373] Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533. Compare Fox v. Paine, 10 Ala. 523.

[374] Bell v. Leggett, 7 N. Y. 176; Marble v. Grant, 73 Me. 423; Rice v. Maxwell, 13 Smedes & M. (Miss.) 289, 53 Am. Dec. 85.

[375] Austin v. Markham, 44 Ga. 161, 10 N. B. R. 548.

[376] Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533.

[377] Coates v. Blush, 1 Cush. (Mass.) 564. Compare Fox v. Paine, 10 Ala. 523.

[378] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316.

[379] Ex parte Briggs, 2 Low. 389, Fed. Cas. No. 1,868.

[380] In re Whitney (D. C.) 250 Fed.

proceeding may be continued from time to time, to suit the convenience of the bankrupt.[381]

§ 691. **Time to File Specifications in Opposition.**—Creditors desiring to oppose the bankrupt's application for discharge are required (by General Order No. 32) to enter their appearance on the day when creditors are required to show cause, and to file their specifications within ten days thereafter. But though the notice to show cause usually designates not only the return day, but a particular hour of that day, creditors are not restricted to the hour so appointed, but have the entire day in which to enter their appearance and ten days thereafter for filing the specifications.[382] The general order does not operate as a statute of limitations, so as to cut off absolutely the right of creditors to file opposition if not exercised within the ten days, or prevent the court from granting an extension of time for good reasons shown.[383] But after the expiration of the ten days, no creditor can claim any absolute right to file specifications. Whether he shall be allowed to do so rests entirely in the discretion of the court. It may be granted as a privilege by the judge, but not without good cause shown, and not unless the creditor clears himself of the imputation of laches.[384] And specifications of opposition filed after the expiration of the prescribed time, without leave of court first obtained or valid excuse for the delay, will be disregarded, or may be dismissed on motion of the bankrupt.[385]

§ 692. **Form and Sufficiency of Specifications.**—Specifications in opposition to the bankrupt's application for discharge must of course be in writing,[386] and must disclose the name of the objecting party, and must allege that he is a party in interest, and, if he is a creditor, that he has a debt provable in bankruptcy, or that it has been proved and allowed if such is the case, and further that his claim is one which will be affected

1005, 41 Am. Bankr. Rep. 548; In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478; In re Blaesser (D. C.) 230 Fed. 528, 36 Am. Bankr. Rep. 795; In re McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490; In re Clark, 19 N. B. R. 301, Fed. Cas. No. 2,812; In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999. Contra, In re Sohoo, 3 N. B. R. 215, Fed. Cas. No. 13,162; In re Wilkinson, 3 N. B. R. 286, Fed. Cas. No. 17,667.

[381] In re Sutherland, Deady, 573, Fed. Cas. No. 13,640.

[382] In re Barrager, 191 Fed. 247, 27 Am. Bankr. Rep. 366.

[383] In re Nathanson, 152 Fed. 585, 18 Am. Bankr. Rep. 252.

[384] In re Young, 162 Fed. 912, 20 Am. Bankr. Rep. 697; In re Price, 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re Marsh, 2 Nat. Bankr. News, 649; In re Levin, 7 Biss. 231, 14 N. B. R. 385, Fed. Cas. No. 8,291; In re Jacobs, 5 Sawy. 458, Fed. Cas. No. 7,160; In re Grefe, 2 N. B. R. 329, Fed. Cas. No. 5,794.

[385] In re Albrecht, 104 Fed. 974, 5 Am. Bankr. Rep. 223; In re Buxbaum, 2 Hughes, 339, 13 N. B. R. 477, Fed. Cas. No. 2,259.

[386] In re Shoemaker, 4 Biss. 245, Fed. Cas. No. 12,799.

by the discharge if granted.[387] As to substance, the specification must distinctly allege at least one of the statutory grounds for refusing the discharge, objections not specified in the act being unavailable.[388] Further, there must be adequate statements of issuable facts; mere statements of conclusions of law are not sufficient.[389] And it is an inflexible rule that the allegations of the specifications must be clear, distinct, specific, and circumstantial. General allegations will not suffice; all the essential facts must be particularized. Vague charges will not do; the allegations must be so precise and full as to inform the bankrupt of the exact charge which he is called upon to refute, and to inform the court of the exact issue to be tried.[390] For this reason a specification which merely follows the general language of the statute, without attempting to set forth particular facts, transactions, or details, is not sufficient.[391] Alternative or disjunctive pleading should not be permitted,[392] and in fact the specifications should be of such a character that their sufficiency may be tested by demurrer or by exceptions analogous to those allowed in equity.[393] It has even been held, in several cases, that the specifica-

[387] In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547; In re White, 248 Fed. 115, 160 C. C. A. 255, 41 Am. Bankr. Rep. 458; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Chandler, 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; In re Servis, 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Palmer, 3 N. B. R. 301, Fed. Cas. No. 10,682.

[388] In re Griffin Bros., 154 Fed. 537, 19 Am. Bankr. Rep. 78; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587. Where specifications of opposition to a discharge wholly fail to state any statutory ground for refusal, their insufficiency is not waived by failing to except thereto, and they may be disregarded. In re McCarthy, 170 Fed. 859, 22 Am. Bankr. Rep. 499.

[389] In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; Stewart v. Hargrove, 23 Ala. 429.

[390] In re Wittenberg, 160 Fed. 991, 20 Am. Bankr. Rep. 398; In re Servis, 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Parish, 122 Fed. 553, 10 Am. Bankr. Rep. 548; In re Waggoner, 1 Ben. 532, Fed. Cas. No. 17,037; In re White, 18 N. B. R. 107, Fed. Cas. No. 17,533; In re Rathbone, 2 Ben. 138, 1 N. B. R. 294, Fed. Cas. No. 11,580; In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Eidom, 8 N. B. R. 106, Fed. Cas. No. 4,314; In re Freeman, 4 Ben. 245, 4 N. B. R. 64, Fed. Cas. No. 5,082; In re Hill, 2 Ben. 136, 1 N. B. R. 275, Fed. Cas. No. 6,482; In re Tyrrel, 2 N. B. R. 200, Fed. Cas. No. 14,314; In re Hansen, 2 N. B. R. 211, Fed. Cas. No. 6,039. See In re Simon (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

[391] In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547; In re Mintzer, 197 Fed. 647, 28 Am. Bankr. Rep. 743; In re Lewis, 163 Fed. 137, 20 Am. Bankr. Rep. 711; In re Bromley, 152 Fed. 493, 18 Am. Bankr. Rep. 227; In re Ginsburg, 130 Fed. 627, 12 Am. Bankr. 459; In re Peck, 120 Fed. 972, 9 Am. Bankr. Rep. 747; In re Graves, 24 Fed. 550; In re Son, 2 Ben. 153, 1 N. B. R. 310, Fed. Cas. No. 13,174. An exception exists in the case of alleging the failure to keep books of account, or the destruction or concealment of books, where, from the nature of the case, it may be impossible for the objecting creditor to particularize. Here an allegation in the language of the statute may suffice. See In re Magen Bros. Co., 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729.

[392] In re Marsh, 2 Nat. Bankr. News, 649.

[393] Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723.

tions must set forth the facts with the same particularity and exactness that are required in an indictment or a criminal information.[394] And this rule may not be too severe in cases where the ground of opposition alleged is the commission of a crime punishable under the bankruptcy law, though otherwise it appears to go to the extreme limit.

An allegation which merely states the creditor's belief that the bankrupt owns property which he is concealing and has not listed in his schedule is insufficient.[395] If this is the ground of opposition relied on, the specification must distinctly allege a concealment of the property or that the trustee has been prevented from taking possession of it,[396] that the property has been concealed from the trustee, a charge that it has been concealed "from his estate in bankruptcy" being insufficient,[397] as is also a statement that the bankrupt has placed his property in the hands of his wife,[398] and it must specify and describe the particular property alleged to have been concealed, with as much certainty as the nature of the case admits, the courts refusing to consider such general statements as that the bankrupt has "concealed a part of his effects," "concealed his estate and effects," or "concealed certain papers," and the like.[399] So if the creditor means to oppose the discharge on the ground that the bankrupt has obtained money or property on credit by means of a materially false statement, he must charge that it was made in writing,[400] and must state the substance of the false statement and the name of the person defrauded by it.[401] Again, where it is specified that the bankrupt has

[394] In re Levey, 133 Fed. 572, 13 Am. Bankr. Rep. 312; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Butterfield, 5 Biss. 120, 14 N. B. R. 147, Fed. Cas. No. 2,247. But compare In re Smith, 5 N B. R. 20, Fed. Cas. No. 12,985; In re Mudd, 2 Nat. Bankr. News, 710. Specifications in opposition to a discharge, especially where attempting to charge some criminal act, should be pleaded with greater particularity than in ordinary civil actions, though the strict rules as to indictments do not apply. In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803.

[395] In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803; In re Abramovitz (D. C.) 253 Fed. 299, 41 Am. Bankr. Rep. 588.

[396] In re Taplin, 135 Fed. 861, 14 Am. Bankr. Rep. 360.

[397] In re Adams, 171 Fed. 599, 22 Am. Bankr. Rep. 613.

[398] In re Hill, 2 Ben. 136, 1 N. B. R. 275, Fed. Cas. No. 6,482. See In re Felts (D. C.) 205 Fed. 983.

[399] In re Parish, 122 Fed. 553, 10 Am. Bankr. Rep. 548; In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803; In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709; In re Opava, 235 Fed. 779, 37 Am. Bankr. Rep. 799. In re Mawson, 2 Ben. 332, 1 N. B. R. 437, Fed. Cas. No. 9,318; In re Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Condict, 19 N. B. R. 142, Fed. Cas. No. 3,094; In re Carrier, 47 Fed. 438; In re Dreyer, 2 N. B. R. 212, Fed. Cas. No. 4,082. But see In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306, as to an allegation that bankrupts had concealed "large quantities of merchandise" in a certain house.

[400] In re Lewis, 163 Fed. 137, 20 Am. Bankr. Rep. 711.

[401] E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302; In re Levey (D. C.) 133 Fed. 572, 13 Am. Bankr. Rep. 312. See In re Epstein (D. C.) 248 Fed. 191, 40 Am. Bankr. Rep. 406; In re Main (D. C.) 205 Fed. 421, 30 Am. Bankr. Rep. 547. A specification of objections

committed perjury in his testimony before the referee, the objection must set out the testimony alleged to be false, together with the facts relied on to prove its falsity, so as to present a specific issue.[402] And a specification stating that the bankrupt procured the assent of certain creditors to the granting of the discharge, without alleging that he did so by means of a pecuniary consideration or otherwise corruptly, is not sufficient.[403] And a specification that the bankrupt has falsely set forth in his petition and schedule that he had no property is defective and insufficient; it must specify what property he had.[404] And the same is true of a specification that the bankrupt made "various contradictory statements" in the course of the proceedings.[405] But it is said that where fraudulent payments are charged, it is not necessary to state that the persons receiving such payments were creditors.[406] Where it is essential that acts alleged as a ground for refusing the discharge should have been committed within a particular period of time, the time must be distinctly specified in the creditor's pleading. An allegation that such an act was done "a short time prior to" the filing of the petition, for instance, will not suffice.[407] Finally, where the specifications filed are too vague and indefinite to be triable, the case stands as if there were no opposition and no specifications filed, and the bankrupt must receive his discharge if otherwise entitled to it.[408]

§ 693. Same; Allegations of Knowledge, Falsity, and Fraudulent Intent.—A specification in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee, is fatally defective if it fails to allege that the offense was committed "knowingly and fraudulently," these words being included in the statute as a necessary part of the crime or ground for refusing a discharge.[409] Thus, an allegation that he has "not offered to surrender all of his property for the benefit of his creditors" and that he is "withholding property from his creditors" is not sufficient,[410] nor is an alle-

to discharge, asserting that the bankrupt obtained property on credit from the objecting creditor on a materially false statement in writing, made for the purpose of obtaining property on credit, is objectionable, where there is no specification or statement of what property was thus obtained. In re Troutman & Jesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418.

[402] In re Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Greer (D. C.) 248 Fed. 131, 40 Am. Bankr. Rep. 797.

[403] In re Mawson, 2 Ben. 332, 1 N. B. R. 437, Fed. Cas. No. 9,318.

[404] In re Beardsley, 1 N. B. R. 304, Fed. Cas. No. 1,183; In re Rathbone, 1 N. B. R. 324, Fed. Cas. No. 11,582.

[405] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[406] In re Smith, 5 N. B. R. 20 Fed. Cas. No. 12,985.

[407] In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; In re Peacock, 101 Fed. 560, 4 Am. Bankr. Rep. 136.

[408] In re Son, 2 Ben. 153, 1 N. B. R. 310, Fed. Cas. No. 13,174.

[409] In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Griffin Bros., 154 Fed. 537, 19 Am. Bankr. Rep. 78.

[410] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

gation that the bankrupt, "with a fraudulent intent, has failed to include in his schedules property belonging to him,"[411] nor a charge that, at the time of filing the petition, he owned and possessed property which he has fraudulently concealed and fraudulently failed to inventory,[412] nor an allegation that he fraudulently disposed of a part of his property and in his petition concealed the fact, and has converted the proceeds of the property to his own use.[413] Similarly, the making of a false oath in a proceeding in bankruptcy, considered as a ground for refusing a discharge, must have been done "knowingly and fraudulently," and if this is not distinctly alleged, the specifications will be insufficient.[414] So again, a charge that the bankrupt has concealed his books of account or destroyed them is defective if it fails to allege that this was done with intent to conceal his financial condition.[415] And if the ground of opposition is that the bankrupt omitted the name and claim of the objecting creditor from his schedule it must be alleged that it was willfully and fraudulently done.[416] And if the act of the bankrupt objected to is a transfer of his property made within four months before the filing of the petition in bankruptcy, it must be alleged to have been made with intent to hinder, delay, or defraud his creditors, though in this case the words "knowingly and fraudulently" need not be used.[417]

§ 694. Same; Allegations as to Failure to Keep Books or Destruction or Concealment of Books.—Where the ground of objection to the bankrupt's discharge is that he has failed to keep books of account from which his financial condition could be ascertained, or that he has destroyed or concealed his books, the specifications of objection may state the charge generally, following the language of the statute, and without giving particulars, since these matters are peculiarly within the bankrupt's own knowledge and cannot ordinarily be specified in detail.[418] And a specification on this ground is not defective for uncertainty be-

[411] In re Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696.

[412] In re Taplin, 135 Fed. 861, 14 Am. Bankr. Rep. 360.

[413] In re Patterson, 121 Fed. 921, 10 Am. Bankr. Rep. 371.

[414] In re Patterson, 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Beebe, 116 Fed. 48, 8 Am. Bankr. Rep. 597; In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Mayer, 195 Fed. 571, 28 Am. Bankr. Rep. 342; In re Smith, 5 N. B. R. 20, Fed. Cas. No. 12,985.

[415] In re Griffin Bros., 154 Fed. 537, 19 Am. Bankr. Rep. 78.

[416] Symonds v. Barnes, 59 Me. 191, 8 Am. Rep. 418, 6 N. B. R. 377.

[417] In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244.

[418] In re Magen Bros. Co., 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729; In re Ginsburg, 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Patterson, 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Bellis, 4 Ben. 53, 3 N. B. R. 496, Fed. Cas. No. 1,275. Compare In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306; In re Dreyer, 2 N. B. R. 212, Fed. Cas. No. 4,082. "Whether a bankrupt has kept such accounts, and if so, whether he retains, conceals, or destroys

cause it alleges, in the disjunctive, that the bankrupt, with intent to conceal his financial condition, either destroyed or failed to keep books of account.[419] So, if the specification charges that he failed to keep books of account or records from which his financial condition could have been ascertained, it is not necessary to proceed further and enumerate or describe the books or records which the bankrupt ought to have kept in order to disclose the state of his affairs.[420] Or if the particular charge is that the bankrupt, intending to conceal his financial condition, destroyed his canceled checks and their stubs, it is not necessary more definitely to describe the checks and stubs alleged to have been destroyed.[421] But the intent to conceal his financial condition is an essential element of this offense, and this must be distinctly alleged. It is not sufficient, for example, to allege that the bankrupt failed to keep books of account "and hence the true status of his affairs cannot be ascertained." It must be specifically charged that his failure to keep books, or his destruction or concealment of them, was in pursuance of an intent to conceal his financial situation.[422] And if the ground of objection is that the bankrupt gave false testimony before the referee in regard to the books which he kept or did not keep, or in regard to the disposition which he has made of them, the specifications must be defi-

them, is a matter peculiarly within his own knowledge and which, in the nature of things, a creditor ordinarily does not know. All he does know is that the bankrupt has not surrendered such books to the trustee. Now the purpose of a specification is to fairly apprise the bankrupt of such matters in bar of his discharge as will be insisted upon, in order that he may be able to meet them. Such matters are not to be specified with the exactness and formality required in indictments, but only in such substantial form as will fairly inform one of the charges made against him. But where, as in the case of books of account, the bankrupt in the very nature of things, and he alone, already knows what books he did or did not keep, and the creditor does not know, except as he infers their nonexistence, concealment, or destruction from the fact of their nondelivery to the trustee, it would seem that a specification following the language of the statute and covering nonkeeping, concealment, or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in that respect." In re Magen Bros. Co., supra.

[419] In re Brod, 166 Fed. 1011, 21 Am. Bankr. Rep. 426, affirmed in Brod v. J. K. Orr Shoe Co., 173 Fed. 1019, 97 C. C. A. 667. "Assuredly three separate specifications charging the bankrupts respectively with destroying, with concealing, and with failing to keep books, etc., would each have been good. Each being singly self-sufficient, certainly there is no reason why the three, united in a single specification, become bad." In re Magen Bros. Co., 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729.

[420] E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302.

[421] E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302.

[422] In re Bialock, 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Bradin, 179 Fed. 768, 24 Am. Bankr. Rep. 793; In re Marston, 5 Ben. 313, Fed. Cas. No. 9,142. A specification of objections against a bankrupt's discharge that he failed to keep books, with full and complete knowledge of the importance and necessity thereof, in the brokerage business, and with intent to "defraud and deceive" the undersigned objecting creditors and others, while inapt, was considered sufficient to sustain an amendment, so as to conform it to the statute. In re Weston,

nite and certain and must set forth such particulars as will raise a distinct issue.[423]

§ 695. **Signature and Verification of Specifications.**—Specifications in opposition to a bankrupt's discharge must be in writing, signed, and verified. If the objecting creditor is a partnership, its signature may be affixed by one of the partners having authority to sign the firm name;[424] if it is a corporation, the specification may be signed by a duly authorized officer, who will also affix the corporate seal.[425] If several creditors desire to urge the same objections to the bankrupt's application for discharge, they are not required to make and sign separate specifications, but may join in one paper,[426] but in that case, each of them must sign and swear to the specification.[427] These specifications are "pleadings," within the meaning of the provision of the bankruptcy act that "all pleadings setting up matters of fact shall be verified under oath,"[428] and therefore they must be sworn to by the objecting creditor.[429] It is said, however, that the want of a verification is an irregularity which may be waived, and it will be considered as waived if the bankrupt does not object to the specification on this ground.[430] At any rate, the defect may be supplied by amendment.[431] The form generally approved for the verification of specifications is that by which the objecting creditor "does hereby make solemn oath that the statements of fact contained" in the specification "are true according to the best of my knowledge, information, and belief."[432]

Though specifications of objection should not ordinarily be signed and verified by attorneys at law or in fact for objecting creditors, instead of the creditors themselves, yet they may be so signed under exceptional circumstances.[433] But in that case the reason why the verification is made by counsel instead of by the creditor in person should be

206 Fed. 281, 124 C. C. A. 345, 30 Am. Bankr. Rep. 647.

[423] In re Nathanson (D. C.) 155 Fed. 645, 19 Am. Bankr. Rep. 56.

[424] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[425] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[426] In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306.

[427] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[428] Bankruptcy Act 1898, § 18c.

[429] In re Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. Bankr. Rep. 252; In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244; In re Servis, 140 Fed. 222, 15 Am. Bankr. Rep. 271. Compare In re Jamieson, 120 Fed. 697, 9 Am. Bankr. Rep. 681.

[430] In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547.

[431] In re Meurer, 144 Fed. 445, 15 Am. Bankr. Rep. 823; In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244. See In re Kretz (D. C.) 212 Fed. 784, 32 Am. Bankr. Rep. 365.

[432] In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391; In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306; In re Peck, 120 Fed. 972, 9 Am. Bankr. Rep. 747.

[433] In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306.

explicitly stated in the affidavit.[434] And in one case it has even been held that attorneys, solicitors, or other agents should not be allowed to verify the specifications, unless in pursuance of a previous order of court allowing them so to do, and in that event both the order and the oath must state the reasons.[435]

§ 696. Amendment of Specifications.—It is within the authority and discretion of the court to permit the amendment of specifications in opposition to the bankrupt's discharge, as, for the purpose of supplying a necessary allegation which was originally omitted,[436] provided the specification, as first drawn, contains enough of substance to warrant an amendment, according to the usual rules in such cases.[437] And it is said that the courts should be liberal in allowing amendments in these cases, where no laches or unfairness on the part of the creditor appears, and no injustice to the bankrupt will result nor any unreasonable delay in the progress of the case.[438] But a speedy discharge of the bankrupt (if he is entitled to it) is one of the objects of the bankruptcy law, and creditors who desire to oppose it must act with reasonable promptness, and they will not be allowed to amend their specifications if justly chargeable with laches.[439] Leave to amend can only be granted by the judge of the bankruptcy court, and application for such leave should be made to him and not to the referee.[440] After the expiration of the ten days allowed for filing specifications of opposition, they can be amended only upon application to the court; and amended specifications filed without leave of court first obtained will be stricken from the files, if the bankrupt so moves.[441] But it is in the power of the judge, on application duly made, to allow amendments after the end of the ten days, provided the amendments are merely enlargements of the specifications already on file, in the way of supplying details, or improving allegations

[434] In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133.

[435] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[436] In re Miller, 192 Fed. 730, 27 Am. Bankr. Rep. 606; In re Walker (D. C.) 209 Fed. 144; In re Pechin (D. C.) 225 Fed. 798, 34 Am. Bankr. Rep. 721; In re Knaszak, 151 Fed. 503, 18 Am. Bankr. Rep. 187; In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Bellis, 4 Ben. 53, 3 N. B. R. 496, Fed. Cas No. 1,275; In re Jacobs, 5 Sawy. 458, Fed. Cas. No. 7,160; Ashley's Adm'r v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

[437] In re Weston, 206 Fed. 281, 30 Am. Bankr. Rep. 647; In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56.

[438] In re Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. Bankr. Rep. 720.

[439] Kentucky Nat. Bank v. Carley, 121 Fed. 822, 58 C. C. A. 158, 10 Am. Bankr. Rep. 375; In re Mudd, 105 Fed. 348, 5 Am. Bankr. Rep. 242.

[440] In re Peck, 120 Fed. 972, 9 Am. Bankr. Rep. 747; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Leszynsky, 2 Nat. Bankr. News, 738; In re Headley, 2 Nat. Bankr. News, 684. But see, as to the authority of a special master, In re Hanna, 168 Fed. 238, 21 Am. Bankr. Rep. 842.

[441] In re Clothier, 108 Fed. 199, 6 Am. Bankr. Rep. 203.

already made, and do not change the substantial nature of the objections urged.[442] But when the time has run, it is too late to permit an amendment setting out an entirely new and separate ground of objection.[443] So, without special reference to the time, an amendment may be allowed for the purpose of inserting a necessary allegation, after the evidence has been taken,[444] but not for the purpose of introducing an entirely new ground of objection and presenting a separate and distinct issue for the consideration of the court.[445]

§ 697. **Exceptions to Sufficiency of Specifications.**—Where a bankrupt presents his application for discharge in due form, and specifications in opposition thereto are filed by creditors, it has been held that no further pleading on the part of the bankrupt is necessary, and that the allegations of the specifications cannot be taken as confessed for want of an answer by the bankrupt,[446] and that his failure to demur to such specifications is not an admission of their legal sufficiency.[447] But clearly the bankrupt may take advantage of defects in the specifications, and refuse to proceed to trial if their allegations are faulty or insufficient. And hence he must have the right to raise the preliminary question of their sufficiency, either by demurrer, by exceptions analogous to those allowed in equity, or in some other proper way.[448] And indeed in some districts, it is the settled practice to require this to be done, within a prescribed time.[449] Further it must be remembered that defects or irregularities in the execution of the specifications will be deemed waived if not seasonably objected to by the bankrupt,[450] and even the objection of the lack of an essential averment will be deemed waived, and will not be considered on appeal, if an exception was not properly taken in the court below.[451]

§ 698. **Dismissal for Want of Prosecution.**—Creditors have an interest in the prompt determination of the bankrupt's application for

[442] In re Osborne, 115 Fed. 1, 52 C. C. A. 595, 8 Am. Bankr. Rep. 165; In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244; In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795.

[443] In re Johnson, 192 Fed. 356, 27 Am. Bankr. Rep. 644.

[444] In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554.

[445] In re Graves, 24 Fed. 550; In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554.

[446] In re Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795.

[447] In re Crist, 116 Fed. 1007, 9 Am. Bankr. Rep. 1.

[448] In re Marsh, 2 Nat. Bankr. News, 649; In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Duncan, 18 N. B. R. 42, Fed. Cas. No. 4,133.

[449] In re Baldwin, 119 Fed. 796, 9 Am. Bankr. Rep. 591; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42. See In re Frosteg (D. C.) 252 Fed. 199, 42 Am. Bankr. Rep. 275.

[450] In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Robinson, 123 Fed. 844, 10 Am. Bankr. Rep. 477; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42.

[451] In re Osborne, 115 Fed. 1, 52 C. C. A. 595, 8 Am. Bankr. Rep. 165.

discharge, because while it is pending they are prevented from pursuing their ordinary remedies against him. But it is doubtful whether the court has authority to dismiss the application, as for want of prosecution, if the bankrupt is guilty of unreasonable delay in bringing it on for hearing. Several of the decisions maintain that this cannot be done, since the statute provides that the discharge "shall" be granted, unless one or other of the enumerated grounds for refusing it is established, and laches or delay on the part of the bankrupt is not among those enumerated grounds.[452] In this event, it is said, any creditor may apply to the court to require the bankrupt to have the question of his discharge determined, or, in other words, a creditor may move to set the case down for hearing,[453] and the court may order that creditors and all others who have proved their debts shall have leave to prosecute any and all suits at law or in equity, as if there had been no adjudication of bankruptcy.[454] But there are other decisions which hold that a bankrupt who delays unreasonably to press his application for discharge is guilty of abusing the proceedings for the sake of hindering creditors, and that a motion to dismiss for want of prosecution is proper in such cases and should be granted.[455] And it is also ruled that the court has authority to allow the bankrupt to withdraw his petition for discharge, no adjudication having passed upon it, and to file a new one at a later day.[456]

§ 699. **Evidence on Application for Discharge.**—On the trial of a bankrupt's application for discharge, to which creditors have filed specifications of opposition, the testimony must be strictly confined to the issues raised by the specifications, and evidence will not be received which relates to grounds of objection not set forth in the specifications, or

[452] In re Glasberg, 197 Fed. 896, 117 C. C. A. 235, 28 Am. Bankr. Rep. 826; In re Wolff, 132 Fed. 396, 13 Am. Bankr. Rep. 95. The fact that, from some unknown cause, the hearing was not held for 19 months after the application for discharge does not authorize the judge to refuse to hear the application at all, or to refuse the discharge. A bankruptcy case is one in equity, and the refusal of the discharge in bankruptcy, the effect of which would be to bar the discharge entirely, and to prevent the discharge of the debts therein filed in other bankruptcy proceedings, is too heavy a penalty to impose for mere delay in bringing the application for discharge on for hearing, in view of the fact that the extreme penalty for negligence in failing to press an equity suit for trial is merely dismissal without prejudice. In re Neal (D. C.) 270 Fed. 289, 46 Am. Bankr. Rep. 325.

[453] In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999; In re Sutherland, Deady, 573, Fed. Cas. No. 13,640.

[454] In re Kelly (D. C.) 3 Fed. 219.

[455] Lindeke v. Converse, 198 Fed. 618, 117 C. C. A. 322, 28 Am. Bankr. Rep. 596; In re Overstreet (D. C.) 268 Fed. 987, 45 Am. Bankr. Rep. 129. In re Lederer, 125 Fed. 96, 10 Am. Bankr. Rep. 492; In re Kuffler, 144 Fed. 445, 16 Am. Bankr. Rep. 305. The case last cited was reversed on appeal, but on other grounds, the reviewing court agreeing with the court below as respects the point to which the decision is here cited. In re Kuffler, 151 Fed. 12, 80 C. C. A. 508, 18 Am. Bankr. Rep. 16.

[456] In re Svenson, 9 Biss. 69, 19 N. B. R. 229, Fed. Cas. No. 13,659.

which relates to transactions outside the scope of the matters alleged.[457] As remarked in one of the cases: "The opposing creditors are bound by their specifications. They cannot go beyond them or produce evidence outside of them. Where would be the use of specifications if this were not so? Instead of apprising the bankrupt of the specific grounds upon which his discharge was to be opposed, they would only tend to deceive and mislead him."[458] Thus, for example, where the ground of opposition specified is that the bankrupt had conveyed his property with intent to defraud creditors, evidence that he concealed his property is immaterial and must be excluded.[459] So, where the specifications allege the making of a false oath by the bankrupt during his examination before the referee, it is not a question of his general truthfulness, but a question as to some specific matter which can be framed into an issue material to the bankruptcy proceedings.[460] Further it is necessary, not only that the opposing creditors should specify some one or more of the statutory grounds for refusing a discharge, but that the particular charge should be sustained by the evidence, that is, each of the constituent elements of the offense or wrongful act alleged against the bankrupt must be supported by proper evidence and satisfactorily proved.[461]

§ 700. **Same; Admissibility of Evidence.**—On the trial of objections to a bankrupt's discharge, much pertinent evidence may usually be drawn from the record of previous proceedings in the bankruptcy case, or of collateral suits growing out of it. For the matters set up in opposition to the discharge have ordinarily been more or less fully investigated at some earlier stage of the proceedings. As to the admissibility of such evidence against the bankrupt, the general rule is that any evidence which he has furnished himself, and which can be used as an admission or declaration against him, may be admitted if relevant, but not records made or testimony given by third parties beyond the control of the bankrupt. Thus, the schedule of property prepared and filed by the bankrupt is evidence against him, but not an inventory or return by the trustee

[457] In re Felts, 205 Fed. 983; In re Bouck, 199 Fed. 453, 28 Am. Bankr. Rep. 378; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057; Tenny v. Collins, 4 N. B. R. 477, Fed. Cas. No. 13,833.

[458] In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057.

[459] In re Bouck, 199 Fed. 453, 28 Am. Bankr. Rep. 378.

[460] Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723.

[461] In re Rosenberg (D. C.) 268 Fed. 658, 45 Am. Bankr. Rep. 319; In re Croonborg (C. C. A.) 268 Fed. 352, 46 Am. Bankr. Rep. 383; In re Brockman, 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Cornell, 97 Fed. 29, 3 Am. Bankr. Rep. 172; In re Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Royal, 113 Fed. 140, 7 Am. Bankr. Rep. 636. But the failure to prove the entire amount of the property alleged to have been concealed by the bankrupt is not a

of the property which came into his hands.[462] So, the bankrupt's sworn answer in a chancery case is admissible against him,[463] or his deposition made in a suit by the trustee against him and others, and the decree in such suit,[464] but not a statement filed in a state court by a creditor,[465] nor the record of proceedings by the trustee in a suit against a third person.[466] So, declarations made by a debtor, at the time of his failure, that he had means to pay all his debts, may be admissible as tending to show a fraudulent concealment of assets, though not alone sufficient for that purpose.[467] But the allegations contained in the creditors' petition in involuntary bankruptcy, on which the adjudication was made, are not evidence against the bankrupt on his subsequent application for discharge, even though he suffered the adjudication to go by default.[468] For similar reasons, the testimony given by the bankrupt on his examination by creditors before the referee is admissible against him on the hearing of his application for discharge, if the correctness of the record produced is properly established,[469] at least in so far as particular portions of such testimony, or particular statements or declarations contained in it, are pointed out by the creditor who wishes to use it, and are shown to be relevant to the issues raised by the specifications of objection.[470] But the testimony of third persons, taken on examinations before the referee, is not admissible.[471] But where the bankrupt's first or original petition for discharge was denied (not on the merits), and he made another application, it was held that the testimony of a witness taken on the hearing under the first petition was competent evidence on the hearing on the second application, the witness having died in the meantime.[472]

In other particulars, the ordinary rules governing the admissibility of evidence will apply in these proceedings. A creditor of a voluntary

fatal defect in the evidence. In re Magen (D. C.) 218 Fed. 692, 33 Am. Bankr. Rep. 346.

[462] Stevens v. Thompson, 17 N. H. 103.

[463] Anonymous, Fed. Cas. No. 463.

[464] In re Leland, 8 Ben. 204, Fed. Cas. No. 8,232.

[465] In re Williams, 6 Biss. 233, 11 N. B. R. 145, Fed. Cas. No. 17,700.

[466] In re Leland, 8 Ben. 204, Fed. Cas. No. 8,232.

[467] In re Delavan, Fed. Cas. No. 3,758.

[468] In re Lathrop, 3 N. B. R. 46, Fed. Cas. No. 8,105.

[469] Shaffer v. Koblegard Co., 183 Fed. 71, 105 C. C. A. 363, 24 Am. Bankr. Rep. 898; In re Goodhile, 130 Fed. 782, 12 Am. Bankr. Rep. 380; In re Bard, 108 Fed. 208, 5 Am. Bankr. Rep. 810; In re Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; In re Malschick (D. C.) 217 Fed. 492, 33 Am. Bankr. Rep. 214.

[470] In re Marsh, 2 Nat. Bankr. News, 649.

[471] In re Goodhile (D. C.) 130 Fed. 782, 12 Am. Bankr. Rep. 380; In re Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362. But compare In re Cooke (D. C.) 109 Fed. 631, 5 Am. Bankr. Rep. 434. And see In re Blaesser (D. C.) 230 Fed. 528, 36 Am. Bankr. Rep. 795, holding that (notwithstanding General Order No. 22) testimony given before the referee by the creditor objecting to the discharge, who died without signing his testimony or being sworn thereto, may be considered when written out and proved by the reporter or some one else.

[472] In re Brockway (D. C.) 12 Fed. 69.

bankrupt is a competent witness for other creditors opposing the bankrupt's discharge.[473] And one who appeared as counsel in an equity suit brought by the trustees against the bankrupt and others may be compelled to testify as a witness for the creditors.[474] The testimony of absent witnesses may be taken by deposition; but in this case notice of the taking of the deposition must be served upon the bankrupt and filed with the referee.[475] An application to examine a witness who is a resident of another state, in support of the creditors' specifications, should be made to the federal district court of the district wherein the witness has his residence.[476] It is of course not necessary, or even possible, to prove every allegation of the specifications by direct testimony, but circumstantial evidence may be relied on in proper cases. Thus, where the charge is the obtaining of goods on credit by means of a materially false statement in writing, the fact that the creditor parted with his property in reliance on such statement may be shown circumstantially.[477] And so, evidence of concealment of assets claimed by the bankrupt to be exempt, although irrelevant as evidence in support of the specifications, might be competent on the question of knowledge to show methods of concealment by the bankrupt with a view to bankruptcy.[478]

§ 701. Same; Burden of Proof.—The filing of specifications in opposition to a bankrupt's application for discharge does not make out a prima facie case against him which he is bound to disprove.[479] But on the contrary, the burden of proof is on the objecting creditors, and they must sustain the allegations of their specifications by satisfactory and convincing evidence, so as to show clearly the existence of at least one of the statutory grounds for refusing a discharge.[480] If they fail in

[473] In re Day, Fed. Cas. No. 3,671a.

[474] In re Leland, 8 Ben. 204, Fed. Cas. No. 8,232.

[475] Bankruptcy Act 1898, § 21c.

[476] In re Robinson, 179 Fed. 724, 24 Am. Bankr. Rep. 617.

[477] In re Reed, 191 Fed. 920, 26 Am. Bankr. Rep. 286.

[478] In re Isaacson, 175 Fed. 292, 23 Am. Bankr. Rep. 665.

[479] In re May, 2 Nat. Bankr. News, 93.

[480] In re Gottlieb (C. C. A.) 262 Fed. 730, 44 Am. Bankr. Rep. 464, 45 Am. Bankr. Rep. 180; Horner v. Hamner, 249 Fed. 134, 161 C. C. A. 186, L. R. A. 1918E, 465, 40 Am. Bankr. Rep. 817; In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664; In re Braun, 239 Fed. 113, 152 C. C. A. 155, 38 Am. Bankr. Rep. 651; Sheinberg v. Hoffman, 236 Fed. 343, 149 C. C. A. 475, 38 Am. Bankr. Rep. 24; Poff v. Adams, Payne & Gleaves, 226 Fed. 187, 141 C. C. A. 185, 35 Am. Bankr. Rep. 307; In re Cohen, 206 Fed. 457, 124 C. C. A. 363, 30 Am. Bankr. Rep. 653; In re Johnson (D. C.) 215 Fed. 748; In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. Rep. 404; In re Haimowich (D. C.) 232 Fed. 378, 36 Am. Bankr. Rep. 648; In re Wix (D. C.) 236 Fed. 262, 38 Am. Bankr. Rep. 185; In re Maaget (D. C.) 245 Fed. 804, 40 Am. Bankr. Rep. 221; In re Lally (D. C.) 255 Fed. 358, 43 Am. Bankr. Rep. 252; In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, 21 Am. Bankr. Rep. 457; In re Eades, 143 Fed. 293, 74 C. C. A. 431, 16 Am. Bankr. Rep. 30; In re Garrison, 149 Fed. 178, 79 C. C. A. 126, 17 Am. Bankr. Rep. 831; In re Walder, 152 Fed. 489, 18 Am. Bankr. Rep. 419; In re Kolster, 146 Fed. 138,

this, the specifications of objection will be overruled and dismissed and the discharge will be granted.[481] But the burden of proof may shift, and put the bankrupt upon the defensive. And this happens when enough has been shown by the creditors to make out a prima facie case, and it can be rebutted only by proof of facts which must be specially and peculiarly within the bankrupt's own knowledge. Thus, where the ground of opposition is the concealment of property from the trustee, and the creditors have shown the recent existence of assets which have not been scheduled or surrendered, and their disappearance or large shrinkage within a short time prior to the bankruptcy, the burden is on the bankrupt to account for the disappearance or diminution of his estate, and if he fails to give a reasonable and credible explanation, the court will be justified in inferring a fraudulent concealment of assets, such as to forfeit his right to a discharge.[482] On a similar principle, an objecting creditor has the burden of showing that a materially false statement made by the bankrupt as a basis for credit was known by him to be untrue when made;[483] but when that fact is proved, the burden shifts to the bankrupt to show that it was not made with intent to deceive.[484] So also, it is said that, to entitle a partner to a discharge notwithstanding the fact that the firm failed to keep proper books of account, with intent on the part of some member to conceal its financial condition, the burden rests on him to prove that he was innocent of any participation therein.[485] When the objecting creditors have shown that the bankrupt failed to keep proper books of account, the circumstances of his business or occupation being such as to make them necessary for an understanding of his financial situation, the presumption then arises that the bankrupt intended the natural and probable consequences of

17 Am. Bankr. Rep. 52; In re Keefer, 135 Fed. 885, 14 Am. Bankr. Rep. 290; In re Hamilton, 133 Fed. 823, 13 Am. Bankr. Rep. 333; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Chamberlain, 125 Fed. 629, 11 Am. Bankr. Rep. 95; In re Fitchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609; In re Wetmore, 99 Fed. 703, 3 Am. Bankr. Rep. 700; In re Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; In re Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Idzall, 96 Fed. 314.

[481] In re Miller, 212 Fed. 920, 129 C. C. A. 440; In re Corn (D. C.) 106 Fed. 143, 5 Am. Bankr. Rep. 478; In re Hirsch (D. C.) 97 Fed. 571, 3 Am. Bankr. Rep. 344; In re O'Kell, 2 N. B. R. 105, Fed. Cas. No. 10,475; In re Harris, 2 N. B. R. 105, Fed. Cas. No. 6,112.

[482] In re Cooper, 230 Fed. 991, 145 C. C. A. 185, 38 Am. Bankr. Rep. 589; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587; In re Diamond, 204 Fed. 137, 30 Am. Bankr. Rep. 363; In re Miller, 203 Fed. 170, 30 Am. Bankr. Rep. 113; In re McCann, 179 Fed. 575, 24 Am. Bankr. Rep. 789; Seigel v. Cartel, 164 Fed. 691, 21 Am. Bankr. Rep. 140; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Finkelstein, 101 Fed. 418, 3 Am. Bankr. Rep. 800; In re Meyers, 96 Fed. 408, 2 Am. Bankr. Rep. 707; In re Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572.

[483] In re Troutman & Gesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418.

[484] In re Arenson, 195 Fed. 609, 28 Am. Bankr. Rep. 113; In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362.

[485] In re Schachter, 170 Fed. 683, 22 Am. Bankr. Rep. 389.

such failure, that is to say, the concealment of his financial condition from his creditors, and, to obtain his discharge, he must rebut this presumption by satisfactory evidence.[486] But these rules do not of course apply in cases where there can be no burden of proof one way or the other, as where the question presented is one of law and not of fact, as, for example, upon the construction of the statute.[487]

§ 702. Same; Weight and Sufficiency of Evidence.—On opposition to a bankrupt's application for discharge, it is not required of the opposing creditors that they should establish the allegations of their specifications beyond a reasonable doubt. Their evidence must, indeed, be sufficient to overcome any opposing presumptions as well as the evidence produced on behalf of the bankrupt,[488] but a proceeding of this kind is not a criminal case, although the ground of opposition specified may also be a crime under the statute. Thus, where it is charged that the bankrupt swore falsely in verifying his schedule or in the proceedings in bankruptcy, the evidence must be sufficiently clear and convincing to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury.[489] In fact, it is only necessary that there should be a fair preponderance of the credible evidence supporting the case of the objecting creditors,[490] but this preponderance must exist, for an evenly balanced condition of the proof will warrant a decision in favor of the bankrupt.[491] It is difficult to characterize exactly the kind of evidence and the weight of the evidence which the creditors must produce, as it necessarily varies greatly with the facts and circumstances of each particular case.[492]

[486] Thompson v. Lamb (C. C. A.) 263 Fed. 61, 45 Am. Bankr. Rep. 316; Devorkin v. Security Bank & Trust Co., 243 Fed. 171, 156 C. C. A. 37, 39 Am. Bankr. Rep. 738; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685; In re Chass (D. C.) 238 Fed. 573, 37 Am. Bankr. Rep. 734.

[487] In re Gilpin (D. C.) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

[488] In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664; In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362; Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; In re Delmour (D. C.) 161 Fed. 589, 20 Am. Bankr. Rep. 405; In re Greenberg (D. C.) 114 Fed. 773, 8 Am. Bankr. Rep. 94. Compare In re Hennebry (D. C.) 207 Fed. 882, 31 Am. Bankr. Rep. 231.

[489] Remmers v. Merchants-Laclede Nat. Bank, 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78.

[490] Thompson v. Lamb (C. C. A.) 263 Fed. 61, 45 Am. Bankr. Rep. 316; In re Brineat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587; In re Atlas (D. C.) 219 Fed. 783, 34 Am. Bankr. Rep. 44; In re Bacon (D. C.) 205 Fed. 545, 30 Am. Bankr. Rep. 584; In re Doyle (D. C.) 199 Fed. 247, 29 Am. Bankr. Rep. 102; In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511; In re Leslie (D. C.) 119 Fed. 406, 9 Am. Bankr. Rep. 561. But compare In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668.

[491] In re Hirsch (D. C.) 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[492] The following cases may be consulted, each of which was concerned with the weight and sufficiency of the evidence offered on a contest of the bankrupt's right to a discharge: In re Rosenfeld (C. C. A.) 262 Fed. 876, 44 Am. Bankr. Rep. 390; Goerner v. Eastman (C. C. A.) 261 Fed. 177, 44 Am. Bankr.

But the general opinion of the courts may be seen from their frequent use, in stating the requirements, of such phrases as "clear and convincing proof," [493] "strict and convincing evidence," [494] "satisfactory and sufficient evidence," [495] "clear and satisfying evidence," [496] and even "indisputable proof." [497] Particularly in regard to questions of fraud, motive, intent, and the like, it is not sufficient to prove merely suspicious circumstances or conduct which wears a sinister aspect.[498] A fraudulent conveyance of property must be shown affirmatively, and it is not sufficient that the bankrupt's evidence on his examination tends indirectly to support the contention of the creditors.[499] And while evasive and disingenuous testimony is not a ground for refusing his discharge, it is a material consideration in determining his credibility when testifying as to what

Rep. 303; Sternburg v. M. Cohen & Co., 254 Fed. 1, 165 C. C. A. 411, 42 Am. Bankr. Rep. 456; In re Schultz, 250 Fed. 103, 162 C. C. A. 275, 41 Am. Bankr. Rep. 367; In re Newmark, 249 Fed. 341, 161 C. C. A. 349, 41 Am. Bankr. Rep. 54; Sherwood Shoe Co. v. Wix, 240 Fed. 692, 153 C. C. A. 490, 38 Am. Bankr. Rep. 670; In re Cooper, 230 Fed. 991, 145 C. C. A. 185, 38 Am. Bankr. Rep. 589; Broomfield v. Lehman, 215 Fed. 97, 131 C. C. A. 405; In re Wakefield (D. C.) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Hindin (D. C.) 219 Fed. 605, 34 Am. Bankr. Rep. 114; In re Arnold, 228 Fed. 75, 35 Am. Bankr. Rep. 740; In re Goldberg (D. C.) 256 Fed. 541, 43 Am. Bankr. Rep. 127; In re Jutkovitz (D. C.) 259 Fed. 915, 44 Am. Bankr. Rep. 231; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685; In re Wiback (D. C.) 245 Fed. 135, 40 Am. Bankr. Rep. 172; In re Kaplan (D. C.) 245 Fed. 222, 40 Am. Bankr. Rep. 181; In re Helfgott (D. C.) 245 Fed. 358, 40 Am. Bankr. Rep. 196; In re Maaget (D. C.) 245 Fed. 804, 40 Am. Bankr. Rep. 221; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Kappes (D. C.) 258 Fed. 653, 44 Am. Bankr. Rep. 159; In re Schroeder (D. C.) 264 Fed. 862, 45 Am. Bankr. Rep. 202; Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; In re Taylor, 182 Fed. 187, 24 Am. Bankr. Rep. 945; In re Margolis, 181 Fed. 591, 24 Am. Bankr. Rep. 934; In re Chamberlain, 180 Fed. 304, 25 Am. Bankr. Rep. 37; In re Tillyer, 147 Fed. 860, 17 Am. Bankr. Rep. 125; In re Burstein, 160 Fed. 765, 20 Am. Bankr. Rep. 399; In re Goldich, 164 Fed. 882, 21 Am. Bankr. Rep. 249; In re Guilbert, 169 Fed. 149, 22 Am. Bankr. Rep. 221; Barton Bros. v. Texas Produce Co., 136 Fed. 355, 69 C. C. A. 181, 14 Am. Bankr. Rep. 502; In re Doherty, 135 Fed. 432, 13 Am. Bankr. Rep. 549; In re Harr, 143 Fed. 421, 16 Am. Bankr. Rep. 213; In re Jacobs, 144 Fed. 868, 16 Am. Bankr. Rep. 482; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Young, 140 Fed. 728, 15 Am. Bankr. Rep. 477; In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100; In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Boyden, 132 Fed. 991, 13 Am. Bankr. Rep. 269; In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Murray, 162 Fed. 983, 20 Am. Bankr. Rep. 700; In re Hedley, 156 Fed. 314, 19 Am. Bankr. Rep. 409; In re Lewin, 155 Fed. 501, 18 Am. Bankr. Rep. 72; In re Moore, 1 Hask. 134, Fed. Cas. No. 9,751.

[493] In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709; In re Lally (D. C.) 255 Fed. 358, 43 Am. Bankr. Rep. 252; In re Taylor (D. C.) 188 Fed. 479, 26 Am. Bankr. Rep. 143; In re Salsbury (D. C.) 113 Fed. 833, 7 Am. Bankr. Rep. 771; In re Howden (D. C.) 111 Fed. 723, 7 Am. Bankr. Rep. 191.

[494] Garry v. Jefferson Bank, 186 Fed. 461, 108 C. C. A. 439, 26 Am. Bankr. Rep. 511.

[495] In re Hirsch (D. C.) 97 Fed. 571, 3 Am. Bankr. Rep. 344.

[496] In re Berner, 2 Nat. Bankr. News, 268.

[497] In re Banks, Fed. Cas. No. 958.

[498] In re Howard, 180 Fed. 399, 103 C. C. A. 545, 24 Am. Bankr. Rep. 841; McCutcheon v. Townley (C. C. A.) 266 Fed. 985, 46 Am. Bankr. Rep. 96. See In re Goodridge, 2 N. B. R. 324, Fed. Cas. No. 5,547.

[499] In re Ferris, 105 Fed. 356, 5 Am. Bankr. Rep. 246.

became of certain money or property.[500] On the other hand, the case may be such that the bankrupt's testimony alone will be sufficient to rebut the case of the creditors, where it is clear and positive and is not discredited by any fact proved.[501]

§ 703. **Hearing and Determination of Application.**—The order of court designating the time and place for hearing the bankrupt's application for discharge, and directing that creditors and other parties in interest may then and there appear and show cause against the same, must be signed by the clerk and bear the seal of the court.[502] And while the proceedings may be continued from day to day, if necessary, an adjournment without day will put an end to them, unless a new order is issued.[503] Under the act of 1867, creditors were entitled to a trial by jury of issues of fact raised by the specifications,[504] but it is otherwise under the present statute, since the law specifically directs that the application for discharge shall be heard by the judge, and since it grants a jury trial only in certain particular cases, among which this is not included.[505] Creditors opposing the bankrupt's application for discharge have the affirmative of the issue, and consequently have the right to begin.[506] The bankrupt must attend the hearing upon his application,[507] and his presence cannot be dispensed with by the referee if it is demanded by the creditors.[508] Further, the creditors have the right to examine the bankrupt, when so in attendance at the hearing, for the purpose of eliciting evidence which will support their objections, and the fact that he has already been examined at an earlier stage of the proceedings will not excuse him from this duty.[509] On this hearing only such grounds of objection to the bankrupt's discharge may be heard and considered as have been set forth in the specifications of the opposing creditors, and the evidence will be confined to the material facts alleged in the specifications.[510] Thus, the question whether or not the debt of a particular creditor is such as to be excepted from the operation of a discharge in bankruptcy cannot properly be raised or tried on the bankrupt's

[500] In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561.

[501] In re Eades, 143 Fed. 293, 74 C. C. A. 431, 16 Am. Bankr. Rep. 30.

[502] In re Bellamy, 1 Ben. 474, 1 N. B. R. 113, Fed. Cas. No. 1,268.

[503] In re Seckendorf, 2 Ben. 462, Fed. Cas. No. 12,600.

[504] In re Lawson, 2 N. B. R. 396, Fed. Cas. No. 8,151.

[505] Bankruptcy Act 1898, § 14b, and § 19a.

[506] Anonymous, Fed. Cas. No. 464.

[507] Bankruptcy Act 1898, § 7. The bankrupt must attend the hearing even though he may have removed from the district pending the proceedings. In re Curle (D. C.) 217 Fed. 688, 33 Am. Bankr. Rep. 502.

[508] In re Shanker, 138 Fed. 862, 15 Am. Bankr. Rep. 109.

[509] In re Mellen, 97 Fed. 326, 3 Am. Bankr. Rep. 226.

[510] In re Taplin, 135 Fed. 861, 14 Am. Bankr. Rep. 360; In re Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Baldwin, 119 Fed. 796, 9 Am. Bankr. Rep. 591. See In re Marshall Paper Co., 93 Fed. 419, 2 Am. Bankr. Rep. 653; In

application for discharge;[511] and the propriety or validity of an order extending the time for filing the application for discharge cannot be reviewed on the hearing of the application itself.[512] And further, a creditor cannot object to the action of the court in granting the discharge, on the ground that the issue found in favor of the bankrupt, and on which the case turned, was inconclusive, where that issue was distinctly raised by the creditor's own allegations.[513] In determining on the application, the court must be governed solely and entirely by the admissible evidence produced on the hearing of the application and objections,[514] and the referee, for instance, has no legal right to consider evidence which has been previously offered before him as referee, if it is not repeated at the present hearing or made a part of the record.[515]

The specifications in opposition may be rejected for insufficiency, or they may be overruled and dismissed if not sustained by the evidence, but in some way they must be disposed of, and a motion to grant the discharge cannot be granted by the court until this has been done.[516] When final action has been taken on the case, it may perhaps be reopened for good cause shown, but not for the purpose of letting in additional evidence when the original hearing was full and complete and the proofs were then formally closed.[517] But an appeal lies from a judgment granting or refusing a discharge.[518] Costs are not usually awarded to the prevailing party unless the objections filed were found to be frivolous or vexatious or, on the other hand, the bankrupt is shown to have the means of paying costs.[519]

§ 704. Same; Powers and Duties of Judge and Referee.—Under the explicit language of the bankruptcy act, the bankrupt's application for discharge must be heard and determined by the judge of the court of bankruptcy, not by the referee. The latter officer has no jurisdiction either to grant or to refuse a discharge, but this duty is cast upon the

re Newmark, 249 Fed. 341, 161 C. C. A. 349, 41 Am. Bankr. Rep. 54. See In re Melkleham (D. C.) 236 Fed. 401, 38 Am. Bankr. Rep. 324.

[511] In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478.

[512] In re Casey, 195 Fed. 322, 28 Am. Bankr. Rep. 359.

[513] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119.

[514] In re Murray, 162 Fed. 983, 20 Am. Bankr. Rep. 700; In re Walder, 152 Fed. 489, 18 Am. Bankr. Rep. 419; In re Halsell, 132 Fed. 562, 13 Am. Bankr. Rep. 106.

[515] In re Walder, 152 Fed. 489, 18 Am. Bankr. Rep. 419.

[516] In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305.

[517] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119; In re Royal, 113 Fed. 140, 7 Am. Bankr. Rep. 636; In re White (D. C.) 242 Fed. 1001, 38 Am. Bankr. Rep. 673.

[518] Bankruptcy Act 1898, § 25a. And see, supra, § 43.

[519] In re George, 1 Low. 494, Fed. Cas. No. 5,326. But this matter may depend upon the local rules of court. See, for instance, In re Fritz, 173 Fed. 560, 23 Am. Bankr. Rep. 84.

judge, who must either hear the case originally or upon the report and recommendations of the referee or a special master, and render the decision.[520] But while this duty cannot be delegated, yet, when specifications in opposition to the bankrupt's application are filed, it is in the power of the judge to refer the issues raised thereby to the referee, in the character of a special master, with instructions to ascertain and report the facts.[521] And while it is customary to select and appoint the referee who has acted in the proceedings as special master to hear the application for discharge, yet any other person may be appointed in the discretion of the judge, and, when so appointed, is entitled to a reasonable compensation.[522] A preliminary question may arise before the referee when the application is thus sent to him, as to the sufficiency of the specifications in opposition, the bankrupt, for example, claiming that they are too vague and indefinite to raise an issue. Though there is some difference of opinion on the point, it is generally held that the referee has authority to pass upon this question, and that he should refuse to receive evidence on specifications which are clearly insufficient,[523] his proper course being to report back to the court that nothing has been filed with him in the way of objections which would require the taking of testimony.[524] But when questions arise as to the admissibility of evidence, the referee has no power to exclude it, but must require and receive an answer to the question objected to, and incorporate in his report to the court the question challenged, the objections made thereto, his ruling on its admissibility, and the answer given.[525] But the functions of the referee are not limited to taking and reporting the evidence adduced on the hearing, but he should also find and report the facts as he deduces them from the evidence and state his conclu-

[520] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143; In re C. H. Kendrick & Co. (D. C.) 226 Fed. 980, 35 Am. Bankr. Rep. 630; In re Hockman (D. C.) 205 Fed. 330, 30 Am. Bankr. Rep. 921; In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Johnson, 158 Fed. 342, 19 Am. Bankr. Rep. 814; In re McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Mawson, 2 Ben. 122, 1 N. B. R. 265, Fed. Cas. No. 9,317; Bankruptcy Act 1898, § 38, cl. 4; Idem, § 1, cl. 16.

[521] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Daugherty, 189 Fed. 239, 26 Am. Bankr. Rep. 550; In re Eldred, 152 Fed. 491, 18 Am. Bankr. Rep. 243; In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266.

[522] In re Gillardon, 187 Fed. 289, 26 Am. Bankr. Rep. 103.

[523] In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Mudd, 2 Nat. Bankr. News, 710; In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795. Compare In re Brockman, 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Puffer, 2 N. B. R. 43, Fed. Cas. No. 11,459.

[524] In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795.

[525] In re Isaacson, 175 Fed. 292, 23 Am. Bankr. Rep. 665; In re Knaszak, 151 Fed. 503, 18 Am. Bankr. Rep. 187. See In re Magen (D. C.) 218 Fed. 692, 33 Am. Bankr. Rep. 346.

sions of law and his recommendation as to whether the discharge should be granted or refused,[526] and in so doing, he should exercise an independent judgment on the facts brought out before him.[527] If his report is incomplete or defective, it will be sent back to him with directions to proceed according to the statute.[528] Otherwise, however, the referee's findings of fact are entitled to the very highest consideration, and while the judge is not technically concluded thereby, but must bring his own mind to bear on the evidence, yet the report of the referee will be accepted as correct, unless very plainly shown to be wrong.[529] And his recommendations will also be considered as entitled to great weight. But a recommendation that the discharge should be granted, when the referee has found that one of the specifications of objection was supported by the evidence, is erroneous and will be disregarded.[530]

Exceptions to the report of the referee, in the character of a special master, on the specifications of opposition and the hearing before him, must be filed within twenty days after the filing of the report, in accordance with the practice in equity.[531] But the time may be extended by the court; and where the record of an order so extending the time to file exceptions was never entered and has been lost or destroyed, the court at a subsequent term has power to supply the record.[532]

[526] In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; In re Hughes, 2 Ben. 85, 1 N. B. R. 226, Fed. Cas. No. 6,841. Where the referee, who heard objections to the bankrupt's petition for discharge, merely reported the testimony and failed to find any conclusion, the court may either find the ultimate facts or refer the matter back to the referee with instructions to find and report the same, that being the more approved practice. In re Troutman & Jesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418.

[527] In re Mayer, 195 Fed. 571, 28 Am. Bankr. Rep. 342; In re Hindin (D. C.) 219 Fed. 605, 34 Am. Bankr. Rep. 114; See In re Rubin & Lipman (D. C.) 215 Fed. 669, 32 Am. Bankr. Rep. 295.

[528] Mahoney v. Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770. In re Lenweaver (D. C.) 226 Fed. 987, 36 Am. Bankr. Rep. 73. A report by the special commissioner on specifications opposing a discharge in bankruptcy, which was in the form of an opinion, need not be returned for particular findings of fact and conclusions of law. In re Rowe (D. C.) 240 Fed. 165, 39 Am. Bankr. Rep. 461.

[529] In re Hughes (C. C. A.) 262 Fed. 500, 44 Am. Bankr. Rep. 447; In re Goldberg (D. C.) 256 Fed. 541, 43 Am. Bankr. Rep. 127; In re Lally (D. C.) 255 Fed. 358, 43 Am. Bankr. Rep. 252; In re Amster (D. C.) 249 Fed. 256, 41 Am. Bankr. Rep. 249; In re Rowe (D. C.) 240 Fed. 165, 39 Am. Bankr. Rep. 461; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628; Baker v. Bishop-Babcock-Becker Co., 220 Fed. 657, 136 C. C. A. 265, 34 Am. Bankr. Rep. 396; In re McCann, 179 Fed. 575, 24 Am. Bankr. Rep. 789; In re Wheeler, 165 Fed. 188, 21 Am. Bankr. Rep. 262; In re Knaszak, 151 Fed. 503, 18 Am. Bankr. Rep. 187; In re Shriver, 125 Fed. 511, 10 Am. Bankr. Rep. 746; In re Lafleche, 109 Fed. 307, 6 Am. Bankr. Rep. 483; In re McKane, 155 Fed. 674, 19 Am. Bankr. Rep. 103; In re Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373.

[530] In re Cohen (D. C.) 192 Fed. 751, 26 Am. Bankr. Rep. 544.

[531] In re Pierce (D. C.) 210 Fed. 389, 32 Am. Bankr. Rep. 96.

[532] International Harvester Co. v. Carlson, 217 Fed. 736, 133 C. C. A. 430, 33 Am. Bankr. Rep. 178.

§ 705. **Staying or Suspending Discharge.**—It is within the authority of the court of bankruptcy to adjourn the hearing on a bankrupt's application for discharge or temporarily to stay proceedings thereon, if it appears that the decision thereon may be affected by the result of pending and uncompleted proceedings, or by the intervention of new parties who desire to come in.[533] Also there may be circumstances in which the rights of creditors would be unjustly cut off by the premature discharge of the bankrupt. Thus, an application for discharge may be stayed until there has been a definite settlement of the rights of creditors who claim the privilege of enforcing their demands against property which has been set apart to the bankrupt as exempt.[534] And a claimant holding a lien against garnishees indebted to the bankrupt is entitled to a stay of the discharge for a reasonable time, to enable him to enforce his rights against the garnishees and the sureties on a bond to dissolve the garnishment.[535] But the court of bankruptcy will not stay its decision on the discharge to await the result of a pending action in a state court wherein creditors of the bankrupt seek to set aside a transfer of property made by him before the adjudication of bankruptcy, and which they allege to have been fraudulent as to creditors, the same plaintiffs opposing the bankrupt's discharge on the ground of the same alleged fraud; for the issues are not identical, nor would the decree of the state court determine the right of the bankrupt to be discharged.[536] So also, under the 1910 amendment to the bankruptcy act, arming the trustee with the rights of a judgment creditor, he is qualified to sue under a state statute to reach surplus revenue to which the bankrupt will be entitled under a testamentary trust, and his recovery will be for the benefit of all the creditors; and since such right will not be affected by the bankrupt's discharge, a judgment creditor is not entitled to have the granting of the discharge postponed to enable him to prosecute such a suit for the benefit of judgment creditors only.[537]

[533] In re Ketchum, 1 Fed. 838; In re Mawson, 1 N. B. R. 271, Fed. Cas. No. 9,320; In re Thompson, 2 Ben. 166, 1 N. B. R. 323, Fed. Cas. No. 13,935; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73. And see In re J. L. Philips & Co., 224 Fed. 628, 34 Am. Bankr. Rep. 877; In re Bishop (D. C.) 253 Fed. 454, 42 Am. Bankr. Rep. 495; Steinhauer & Wight, Inc., v. Adair, 20 Ga. App. 733, 93 S. E. 280.

[534] In re Woodruff, 96 Fed. 817, 2 Am. Bankr. Rep. 678; In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729; In re Mitchell, 175 Fed. 877, 23 Am. Bankr. Rep. 707.

[535] In re Maher, 169 Fed. 997, 22 Am. Bankr. Rep. 290.

[536] In re Cornell, 97 Fed. 29, 3 Am. Bankr. Rep. 172.

[537] In re Morris, 204 Fed. 770, 123 C. C. A. 220. It was otherwise before the amendment of 1910. See In re Tiffany, 147 Fed. 314, 17 Am. Bankr. Rep. 296.

§ 706. Order of Discharge.—The form for an order granting a discharge to a bankrupt has been officially prescribed.[538] The court of bankruptcy has power to amend an order of discharge at any time before the proceedings in the case have been closed, provided such amendment will not affect vested rights.[539] And on the other hand, an order granting or refusing a discharge may be entered nunc pro tunc, where the parties have acted on the theory that such an order was in force, and the rights of third persons will not be prejudiced,[540] or where other circumstances make such a course proper. Thus, a discharge in bankruptcy is not void because granted after the death of the bankrupt,[541] but in such a case it should be entered as of a date prior to his decease.[542] Where specifications in opposition to the discharge have been overruled, and the discharge ordered, the bankrupt's certificate of discharge will not issue until the expiration of ten days after the order, or until the expiration of any extension of the time allowed to creditors to appeal from such order.[543] As to the substance of the order of discharge, it will be expressed always in general terms, and will not attempt to enumerate or describe the debts which are excepted from its operation. On the application for discharge, the character of any particular debt is not in issue, nor will the court undertake to decide whether or not it will be released by the discharge. Hence creditors having claims which they allege to be within the excepted classes cannot ask the court to frame its order of discharge in such a way as to make specific exceptions in favor of their debts. The court will grant a discharge in the usual form, leaving its scope for future determination when the question shall properly arise.[544]

Equity Rule 4, providing that where an order is entered in the equity docket or order book without prior notice to or in the absence of a party, the clerk shall forthwith send notice thereof to the party's solicitor, does not apply to a judgment of discharge in bankruptcy, since the bankruptcy side of the court is entirely distinct from the equity side, and the dockets are separate, although proceedings in bankruptcy are in a general way assimilated to proceedings in equity.[545]

[538] Official Form No. 59.

[539] In re Diamond, 149 Fed. 407, 79 C. C. A. 227, 17 Am. Bankr. Rep. 563.

[540] In re Drisko, 2 Low. 430, 13 N. B. R. 112, Fed. Cas. No. 4,090.

[541] Robinson v. Butler, 4 Ky. Law Rep. 449; In re Parker, 1 Nat. Bankr. News, 261.

[542] Young v. Ridenbaugh, 3 Dill. 239, 11 N. B. R. 563, Fed. Cas. No. 18,173; Robinson v. Butler, 4 Ky. Law Rep. 449.

[543] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[544] In re Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592. But see In re J. L. Philips & Co. (D. C.) 224 Fed. 628, 34 Am. Bankr. Rep. 877, as to granting a discharge on conditions which will protect a garnishing creditor.

[545] In re Stafford (D. C.) 240 Fed. 155, 39 Am. Bankr. Rep. 469.

§ 707. **Revoking Discharge.**—The statute provides that "the judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."[546] It will be observed that this authority is given exclusively to the judge of the court of bankruptcy and cannot be exercised by the referee. But the petition for revocation of a discharge may be referred to the referee as special commissioner, to ascertain and report upon the matters of fact alleged in the petition.[547] It is also held that the jurisdiction to revoke or cancel a discharge is vested exclusively in the court of bankruptcy which granted it, and a federal court of equity in a district other than that in which the discharge was granted, has no jurisdiction to set it aside for fraud.[548] But it is still an open question whether the court of bankruptcy has such control over an order of discharge once entered as courts of record possess with reference to their ordinary judgments or orders, or whether its jurisdiction is limited to the precise grounds, presented in the precise way, set forth in the statute. Several decisions maintain that the court has power, on motion of a proper party, or even on its own motion, to set aside or recall an order of discharge for such causes (aside from the charge of fraud in obtaining it) as would justify that action in any other case, as, for instance, mistake, surprise, or unavoidable accident.[549] But other cases, while conceding this authority, hold that it cannot be exercised after the expiration of a year from the time of granting the discharge.[550]

The application must be made by a "party in interest," and a petition which merely alleges that the petitioner is a "creditor" does not sufficiently allege this fact; the petition must show that he had a provable debt which would be affected by the discharge.[551] But the fact that a creditor has omitted to prove his claim and that it has become too late for him to do so does not deprive him of the character of a party in

[546] Bankruptcy Act 1898, § 15a.

[547] In re Meyers, 100 Fed. 775.

[548] Atlantic Dynamite Co. v. Reger, 200 Fed. 1002, 29 Am. Bankr. Rep. 659; Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223.

[549] In re Louisville Nat. Banking Co., 158 Fed. 403, 85 C. C. A. 513; In re Bimberg, 121 Fed. 942, 9 Am. Bankr. Rep. 601; In re Dupee, 2 Low. 18, 6 N. B. R. 89, Fed. Cas. No. 4,183. A discharge may be vacated to allow creditors to file specifications of opposition thereto, when their failure to file the specifications at the proper time occurred through mistake. In re Applegate (D. C.) 235 Fed. 271, 37 Am. Bankr. Rep. 759.

[550] In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823.

[551] In re Chandler, 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; In re Groodzinsky (D. C.) 248 Fed. 753, 40 Am. Bankr. Rep. 861; In re Levy (D. C.) 227 Fed. 1011, 36 Am. Bankr. Rep. 181.

interest, since, if he succeeds in having the discharge vacated, he can collect his debt from the bankrupt's after-acquired property.[552] And a creditor who neglects to file objections in due time, and subsequently discovers fraud, may require the bankrupt to take his discharge and then apply to revoke it.[553] Moreover, the bankrupt himself is a party in interest, and may move to have the discharge set aside, for the purpose of amending his schedules by including debts which were originally omitted through mistake or inadvertence.[554] By whomsoever filed, a petition to vacate the discharge on the statutory ground must set forth distinctly each one of the facts necessary to sustain it and to justify the action asked for.[555] And the law does not authorize a rehearing or new trial on specifications already filed in opposition to the discharge, and which were heard and determined before the discharge, even if the opposing creditor can adduce new facts, happening since the discharge, which would be competent evidence if a new trial were authorized by the statute.[556] Besides this, the burden of proof is on a petitioner seeking to have the discharge vacated, and he must prove, by sufficient evidence, every fact essential to the jurisdiction of the court and to its exercise in the particular case.[557] The act also provides that when a discharge is revoked, the trustee shall be vested with the title to all of the property of the bankrupt as of the date of the final decree revoking the discharge,[558] and also that the property acquired by the bankrupt in addition to that which composed his estate at the time the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while the discharge was in force.[559]

§ 708. Same; Time for Application; Laches.—The period of one year within which an application to revoke a bankrupt's discharge must be filed begins to run from the date of the order granting the discharge, and not from the discovery of the fraud on which the application is based.[560] And the requirement that the application shall be presented

552 In re Bimberg, 121 Fed. 942, 9 Am. Bankr. Rep. 601. But see Arrington v. Arrington, 132 Fed. 200, 13 Am. Bankr. Rep. 89.

553 In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999.

554 In re McKee, 165 Fed. 269, 21 Am. Bankr. Rep. 309. A discharge will be set aside and the case reopened to allow the bankrupt to amend his schedules to include a debt which, through mistake, was listed in the name of the wrong party. In re Adams (D. C.) 242 Fed. 335, 40 Am. Bankr. Rep. 22.

555 In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823; Vary v. Jackson, 164 Fed. 840, 21 Am. Bankr. Rep. 334; In re Bates, 27 Fed. 604.

556 In re Corwin, 1 Fed. 847.

557 In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823; In re Stetson, 4 Ben. 147, 3 N. B. R. 726, Fed. Cas. No. 13,381.

558 Bankruptcy Act 1898, § 70d.

559 Bankruptcy Act 1898, § 64c.

560 Mall v. Ulrich, 37 Fed. 653; Pickett v. McGavick, Fed. Cas. No. 11,126; In re Brown, Fed. Cas. No. 1,983; In re Her-

within the year is a limitation directly on the power or jurisdiction of the court, as distinguished from a limitation on the cause of action, so that, if this provision of the law is not complied with, it is beyond the power of the court to revoke the discharge.[561] It is even doubtful whether leave to amend a defective petition can be granted after the expiration of the year. Applications for leave to amend have been refused, when the year had fully run, when the petitions as originally presented were insufficient in substance, though filed in due time.[562]

But there is authority for the proposition that this special statute of limitations applies only where the revocation of the discharge is sought on the one ground specified in the fifteenth section of the Bankruptcy Act, that is, that it was "obtained through the fraud of the bankrupt." A discharge, for instance, which was granted without any notice to the creditors is invalid, and therefore a petition by creditors for its revocation is not barred by the lapse of a year.[563]

Even in the case of an application to revoke for the cause of fraud, however, it is further necessary that the application should be presented by a party who has "not been guilty of undue laches." This is not an exception to the prescription of the statute, but an additional prerequisite to the revocation, and does not dispense with the limitation of one year after discovery of the fraud.[564] And the practical construction put upon the act by the courts does not permit the creditor to take the whole of the statutory year (or practically all of it) before the imputation of laches can attach to him. On the contrary, he may be chargeable with laches in his conduct even before the discharge was granted. Thus, a creditor who had ample opportunity during the pendency of the proceedings to examine the bankrupt fully as to all matters regarded as fraudulent or suspicious, and who appeared in opposition to his discharge, and was given time to file specifications of opposition, but failed to do so, and permitted the discharge to be granted without further objection, is not entitled to be heard on a subsequent application to revoke the discharge, being guilty of laches.[565] The case may be otherwise

zig, 16 Abb. New Cas. (N. Y.) 179. As to waiver of the statute of limitations by the bankrupt, see In re Graff (D. C.) 242 Fed. 577, 40 Am. Bankr. Rep. 205.

[561] In re Howard, 201 Fed. 577; In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823; In re Weintrob (D. C.) 263 Fed. 904, 45 Am. Bankr. Rep. 390. Since an action to set aside the discharge of a bankrupt must be brought within a year from the discharge, a state court, even if it had jurisdiction, could not set aside the discharge after the lapse of more than a year. Andrus v. Cornwell, 134 La. 403, 64 South. 221.

[562] In re Howard, 201 Fed. 577; In re Sims, 9 Fed. 440.

[563] John B. Ellison & Sons v. Weintrob (C. C. A.) 272 Fed. 466, 46 Am. Bankr. Rep. 353.

[564] In re Weintrob (D. C.) 263 Fed. 904, 45 Am. Bankr. Rep. 390.

[565] In re Upson (D. C.) 124 Fed. 980, 10 Am. Bankr. Rep. 758; In re Mauzy (D. C.) 163 Fed. 900, 21 Am. Bankr. Rep. 59. And see In re Groves (D. C.) 244 Fed. 197, 39 Am. Bankr. Rep. 853.

where the petitioner had no opportunity either to discover the fraud in question before the discharge was granted or to allege it in opposition to the discharge.[566] But one in this position must show very clearly how and when he acquired information of the fraud, and that he failed to receive notice of the application for discharge or was otherwise prevented from setting it up at that time.[567]

But even if there is nothing in the conduct of the creditor before or at the time of granting the discharge to charge him with laches, and if the fraud was really discovered after the order of discharge (as the statute intends), still he must act with reasonable promptness after the discovery. An unexcused delay of eight months, for example, will be ground for refusing to entertain a petition for the revocation of the discharge.[568] So, in a case under the former bankruptcy law, where the interest of the creditors who petitioned for a review of the discharge was small in comparison with the aggregate of the debts, and the bankrupt had resumed his business on the faith of his discharge, and had entered into extensive contracts, it was held that five months was too unreasonable a delay on the part of the creditors, no sufficient excuse being offered and the petition must be dismissed.[569] And it is not only necessary that the application for revocation of the discharge should be presented in due time, but it must be prosecuted with reasonable diligence. In a case where a creditor applied for the revocation of the bankrupt's discharge within little more than two months after it was granted, but then delayed for more than seven years to bring the matter on for hearing, during which time the bankrupt died, it was held that the creditor's right to prosecute his application was barred by his laches, as against the heirs and legal representatives of the bankrupt.[570]

§ 709. **Same; Grounds for Revoking.**—The bankruptcy act specifies but one single ground for revoking the discharge of a bankrupt, that is, that it was "obtained through the fraud of the bankrupt."[571] And the

[566] In re Griffin Bros. (D. C.) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

[567] In re Howard (D. C.) 201 Fed. 577.

[568] In re Downing (D. C.) 199 Fed. 329, 28 Am. Bankr. Rep. 778.

[569] In re Murray, 14 Blatchf. 43, Fed. Cas. No. 9,953. And see In re Buenstein, 9 Ben. 215, Fed. Cas. No. 2,076.

[570] Drees v. Waldron, 128 C. C. A. 609, 212 Fed. 93, 128 C. C. A. 609, 31 Am. Bankr. Rep. 722.

[571] This is true of a proceeding strictly to "revoke" a discharge in bankruptcy. Aside from this, however, the court undoubtedly has jurisdiction to set aside or annul an order of discharge in bankruptcy in the same manner and on the same grounds which would justify the like action with respect to any other judgment rendered by it. Thus, the statute explicitly requires that the creditors shall have 30 days' notice of an application for the bankrupt's discharge, and if this requisite is entirely omitted, the discharge granted is invalid and may therefore be set aside. John B. Ellison & Sons v. Weintrob (C. C. A.) 272 Fed. 466, 46 Am. Bankr. Rep. 353. But jurisdiction to hear and act upon the application for discharge having been established by the mailing of notices to the creditors, the discharge is not invalid and cannot

term "fraud," as here used, means bad faith, involving moral turpitude or intentional wrong, as distinguished from fraud in law.[572] It must be actual fraud knowingly practiced by the bankrupt.[573] And the fraud must have been practised in "obtaining" the discharge. Fraud committed by the bankrupt prior to his adjudication, or at any earlier stage of the proceedings in bankruptcy, will not be sufficient. It constitutes a ground for objecting to the grant of a discharge, and should be set up in opposition thereto, but the order of discharge precludes the subsequent allegation of fraud so committed, and it cannot be made the basis of a petition to revoke.[574] But the willful and fraudulent concealment of property, practised by the bankrupt throughout the whole proceedings, and continued up to and through the proceedings on his application for discharge, constitutes the suppression of a fact which, if it had been known, would have barred his right to a discharge, and therefore may be considered as fraud in the obtaining of the discharge, so that, if it comes to the knowledge of parties in interest only after the discharge has been granted, and they act promptly, it will furnish ground for revoking the discharge.[575] So the willful and intentional omission of a creditor's name or address from the bankrupt's schedule may be ground for annulling the discharge, when done with the purpose of keeping the proceeding secret from that creditor and preventing him from opposing the discharge.[576] A more direct instance of fraud in obtaining the discharge is presented in the case where the bankrupt, though perfectly well acquainted with the correct address of a given creditor, causes the notice of his application for discharge to be sent to a wrong address, so that the creditor has no knowledge of the proceedings for discharge in time to act.[577] Again, it is a fraud upon the law and ground for revoking a discharge where a creditor who has filed specifications of opposition

be set aside merely because one creditor failed to receive his notice, the same having been duly mailed to him. In re Walsh (D. C.) 213 Fed. 643.

572 In re Cuthbertson (D. C.) 202 Fed. 266, 29 Am. Bankr. Rep. 823. And see In re Griffin Bros. (D. C.) 154 Fed. 537, 19 Am. Bankr. Rep. 78; In re Augenstein, 2 MacArthur (9 D. C.) 322, 16 N. B. R. 252.

573 In re Wright, 177 Fed. 578, 24 Am. Bankr. Rep. 437.

574 In re Hoover, 105 Fed. 354, 5 Am. Bankr. Rep. 247; In re Adams, 29 Fed. 843; In re Weintrob (D. C.) 263 Fed. 904, 45 Am. Bankr. Rep. 390.

575 In re Meyers, 100 Fed. 775; In re Paine, 127 Fed. 246, 11 Am. Bankr. Rep. 351; In re Augenstein, 2 MacArthur (D. C.) 322, 16 N. B. R. 252; In re Rainsford, 5 N. B. R. 381, Fed. Cas. No. 11,537. See also In re Hansen, 107 Fed. 252, 5 Am. Bankr. Rep. 747; Throop v. Griffin, 180 Pa. St. 452, 36 Atl. 865.

576 In re Herrick, 7 N. B. R. 341, Fed. Cas. No. 6,419. But the omission by a bankrupt of a debt from the schedule annexed to his petition is not ground for setting aside the discharge, where there was no fraudulent purpose, although the omitted creditor had no notice of the bankruptcy proceedings in time to have proved his claim, since in this case the creditor is not prejudiced by the discharge. In re Monroe, 114 Fed. 398, 7 Am. Bankr. Rep. 706.

577 In re Roosa, 119 Fed. 542, 9 Am. Bankr. Rep. 531. But see In re Fritz, 173 Fed. 560, 23 Am. Bankr. Rep. 84.

thereto is induced, by a pecuniary consideration, to withdraw his opposition and permit the discharge to be granted as unopposed, and this, though the payment was not made by the bankrupt but by a third person, if the bankrupt knew of and consented to the arrangement.[578] And the same rule has been applied in a case where certain of the objecting creditors withdrew their opposition without any corrupt motive, but without notifying other creditors who had relied on the specifications filed as representing their own objections and instructed their attorneys to co-operate with the attorneys of the objecting creditors.[579]

Further it is necessary that knowledge of the fraud alleged should have come to the creditors seeking to have it revoked "since the discharge was granted." If they knew of it in time to have interposed it as a bar to the discharge, they cannot use it in this way afterwards.[580] And a discharge will not be set aside when the fraudulent acts relied on by the creditors were suspected and believed to exist, though not positively known, before the discharge was granted,[581] nor where the facts in question, though not within the creditor's personal knowledge, were well known to the trustee in bankruptcy before the discharge, since the trustee is the representative of the creditors and his knowledge is imputable to them.[582]

§ 710. Conclusiveness and Effect of Discharge.—The bankruptcy act provides that a certified copy of an order granting a discharge shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[583] This applies to proceedings in all courts; and a state court is bound to take notice of a discharge in bankruptcy under the federal law when it is properly pleaded.[584] But aside from this, an order of discharge is a judgment and is supported by the same presumptions which attach to any other; and therefore it is conclusive evidence of all facts appearing on the record or deducible therefrom by necessary inference, and of the fact that the bankrupt has been lawfully discharged from all of his provable debts save those specifically excepted by the statute.[585] But the right to a discharge

[578] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316. Compare Heim v. Chapman, 171 Mass. 347, 50 N. E. 529.

[579] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316. But see In re Douglass, 11 Fed. 403.

[580] In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999. A discharge cannot be revoked, nine months after it was granted, on account of the bankrupt's failure to schedule certain property, where it does not appear that the creditors were not at all times well aware of the material circumstances, or that they extended credit on account of the bankrupt's possession of such property. Gage v. Penfield, 249 Fed. 961, 162 C. C. A. 159, 41 Am. Bankr. Rep. 322.

[581] Marrionneaux's Case, 1 Woods, 37, 13 N. B. R. 222, Fed. Cas. No. 9,088.

[582] In re Hansen, 107 Fed. 252, 5 Am. Bankr. Rep. 747.

[583] Bankruptcy Act 1898, § 21f.

[584] Wood v. Carr, 115 Ky. 303, 73 S. W. 762.

[585] Palmer v. Hussey, 119 U. S. 96, 7

and the effect of it when granted are entirely distinct questions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied on by the debtor as a defense to the enforcement of a particular claim, and that issue cannot properly arise or be considered in determining the right to a discharge, and therefore the discharge is not evidence on the question whether or not a particular claim is within the excepted classes.[586] Assuming, however, that it is not so excepted, it is to be remarked that a discharge in bankruptcy operates only as a bar to an action for the recovery of the debt, and not as a payment of the debt or as a release and extinguishment.[587] A moment's reflection will show that, if this were not so, a barred debt could not be revived and made enforceable by a new promise to pay it. But a discharge in bankruptcy is a plea in bar,[588] which is a perfect defense to a suit on a debt barred thereby,[589] and a plea of discharge in bankruptcy is a legitimate and meritorious defense which is not to be regarded with any disfavor by the courts.[590] This plea may be interposed in a suit begun before the bankruptcy and still pending after the discharge, as, in a creditor's suit, where it may be set up in a supplemental answer.[591] Or the plaintiff in any pending suit may anticipate the plea of a discharge in bankruptcy, and may, by leave of court and before defendant has pleaded his discharge, discontinue the action, without costs; or if the defendant pleads his discharge, no terms being imposed,

Sup. Ct. 158, 30 L. Ed. 362; Crouse v. Whittlesey, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 965; Ruckman v. Cowell, 1 N. Y. 505; Blake v. Bigelow, 5 Ga. 437; Boas v. Hetzel, 3 Pa. St. 298; Belknap v. Davis, 21 Vt. 409; Tichenor v. Allen, 13 Gratt. (Va.) 15; Jones v. Knox, 51 Ala. 367; Norris v. Goss, 2 Speer (S. C.) 80. See In re Krall, 196 Fed. 402, 28 Am. Bankr. Rep. 452; Andrus v. Cornwell, 134 La. 403, 64 South. 221.

[586] In re Lockwood, 240 Fed. 161, 39 Am. Bankr. Rep. 482; Hallagan v. Dowell, 179 Iowa, 172, 161 N. W. 177; In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; In re McCarty, 111 Fed. 151, 7 Am. Bankr. Rep. 40; United States v. Peters, 166 Fed. 613, 22 Am. Bankr. Rep. 177.

[587] In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266; Butler Cotton Oil Co. v. Collins, 200 Ala. 217, 75 South. 975; American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692; Rate v. American Smelting & Refining Co., 56 Mont. 277, 184 Pac. 478; Herrington v. Davitt (Sup.) 145 N. Y. Supp. 452; Lanier v. Tolleson, 20 S. C. 57; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Citizens' Loan Ass'n v. Boston & M. R. Co., 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365. Compare J. B. Ellis & Co. v. Mobile, J. & K. C. R. Co., 166 Ala. 187, 51 South. 860; Needham v. Matthewson, 81 Kan. 340, 105 Pac. 436, 26 L. R. A. (N. S.) 274, 135 Am. St. Rep. 374, 19 Ann. Cas. 146.

[588] House v. Schnadig, 138 Ill. App. 498.

[589] Craig v. Seitz, 63 Mich. 727, 30 N. W. 347. In re Weisberg (D. C.) 253 Fed. 833, 42 Am. Bankr. Rep. 616. In an action against husband and wife, an answer, pleading the discharge of the husband in bankruptcy, is a good defense both as to him and as to the community property. Sounds Credits Co. v. Powers, 100 Wash. 668, 171 Pac. 1031.

[590] Citizens' Nat. Bank v. Branden, 19 N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 858.

[591] Stewart v. Isidor, 5 Abb. Prac. N. S. (N. Y.) 68, 1 N. B. R. 485; Fort-Mims & Haynes Co. v. Branan-Akers Co., 140 Ga. 131, 78 S. E. 721.

and recovers judgment, he will be entitled to his costs the same as in other cases; for the principle that, where a cause of action is extinguished, the action cannot proceed for the mere purpose of recovering costs does not apply to the status of an action to recover a debt after it has been discharged in bankruptcy, the action having been commenced before the discharge.[592] And the discharge has no necessary effect on the right or duty of a trustee in bankruptcy to continue the prosecution of an action already begun by him.[593]

A discharge in bankruptcy will revoke a power of attorney to confess judgment,[594] and excuse the debtor from complying with the condition of a bond, before given, to take the benefit of the state insolvency law,[595] and release him from liability on a note given before the adjudication, though it was expressly stated to have been given for cash advanced to enable him to file his petition in bankruptcy.[596] But a discharge does not extinguish any valid lien,[597] nor terminate a lease in which the bankrupt is the tenant, unless the landlord re-enters or the trustee has assumed the lease,[598] nor will it be a defense to an action for the breach of the bankrupt's bond as a public officer, occurring subsequent to the discharge.[599] And in a suit to recover damages for personal injuries, plaintiff is not precluded from recovering reasonable charges incurred for the services of a physician and other like charges, necessarily resulting from his injury, because he included such claims in his schedule in bankruptcy and had been discharged from legal liability for the same.[600] So, in an action of trover, neither the defendant nor his surety in the bail bond therein can set up as a defense the discharge of the defendant in bankruptcy pending the trial, the petition in trover being one of title and not of debt.[601]

§ 711. Effect of Discharge as to Property Fraudulently Transferred or Not Scheduled.—A discharge in bankruptcy, while it releases the

[592] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

[593] In re Penn, 5 Ben. 500, 8 N. B. R. 93, Fed. Cas. No. 10,928; Guernsey v. Douglas, 171 Cal. 329, 153 Pac. 227.

[594] Dye v. Bartram, 5 Ohio Dec. 508.

[595] Nesbit v. Greaves, 6 Watts & S. (Pa.) 120; Hubert v. Horter, 81 Pa. St. 39, 14 N. B. R. 430.

[596] Nelson v. Stewart, 54 Ala. 115, 25 Am. Rep. 660.

[597] Reed v. Bullington, 49 Misc. 223, 11 N. B. R. 408; Boone v. Revis, 44 Tex. 384. See Hartnett v. Wilson, 31 Cal. App. 678, 161 Pac. 281. Although a defendant receives a discharge in bankruptcy, which he sets up in a plea puis darrein continuance, the suit may still proceed to a qualified or special judgment, to permit the plaintiff to enforce a lien by attachment against defendant's property, or to bring suit against the sureties on a bond given to release such attachment. Star Braiding Co. v. Stienen Dyeing Co. (R. I.) 114 Atl. 129.

[598] Witthaus v. Zimmermann, 91 App. Div. 202, 86 N. Y. Supp. 315.

[599] White v. Blake, 79 Me. 114, 8 Atl. 457.

[600] Sibley v. Nason, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938.

[601] Berry v. Jackson, 115 Ga. 196, 41

bankrupt from personal liability for his debts and gives him his after-acquired property free from any liability therefor, does not release any property owned by him at the commencement of the proceedings. Title thereto passes by operation of law to the trustee in bankruptcy, and this title is not affected by the discharge of the bankrupt. Hence the discharge does not in any way preclude the trustee from recovering property previously transferred by the bankrupt in fraud of his creditors.[602] It has also been ruled in several cases that, after the discharge, creditors may proceed in any proper form of action or suit to subject to their claims any property of the bankrupt which he omitted to list in his schedule of assets, whether such omission was fraudulently planned or was the result of mere oversight.[603] But since the bankruptcy law expressly confers on a trustee in bankruptcy the right to avoid any transfer by the bankrupt of his property which any creditor might have avoided, and to recover the property so transferred or its value, the better opinion appears to be that a judgment creditor of the bankrupt, after the latter's discharge, cannot levy on and sell the bankrupt's property because of fraud in securing the discharge, but the rights of creditors must be worked out through the trustee.[604] Notwithstanding a bankrupt's discharge, where the estate has not been technically closed, the court of bankruptcy has jurisdiction, by an order made in summary proceedings, to compel the bankrupt to surrender to the trustee property belonging to the estate, the existence of which was concealed or had not come to the knowledge of the trustee before the discharge was granted.[605]

§ 712. **Collateral Impeachment of Discharge.**—An appeal may be taken from an order granting a discharge in bankruptcy, or the court which granted it may revoke it, within one year, for the causes specified in the statute. But these remedies are absolutely exclusive, and a state court can neither annul nor disregard a discharge duly granted by

S. E. 698, 90 Am. St. Rep. 102; Birmingham Fertilizer Co. v. John A. Cox & Son, 10 Ga. App. 699, 73 S. E. 1090; Watts v. Wight Inv. Co., 25 Ga. App. 291, 103 S. E. 184.

[602] In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Groves (D. C.) 244 Fed. 197, 39 Am. Bankr. Rep. 853; Nye v. Hart, 22 Ohio Cir. Ct. R. 427; Stephenson v. Bird, 168 Ala. 363, 53 South. 92, Ann. Cas. 1912B, 249; McLeod's Trustee v. McLeod, 89 S. W. 199, 28 Ky. Law Rep. 284; Blick v. Nimmo, 121 Md. 139, 88 Atl. 116.

[603] Horn v. Bates (Ky.) 114 S. W. 763; Card v. Walbridge, 18 Ohio, 411. See Rand v. Iowa Cent. Ry. Co., 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530, 9 Ann. Cas. 542. Compare Boyd v. Olvey, 82 Ind. 294.

[604] Hibbard v. Henderson, 44 Or. 318, 75 Pac. 889.

[605] Levy v. Schorr (C. C. A.) 266 Fed. 207, 45 Am. Bankr. Rep. 324; In re Margolies (C. C. A.) 266 Fed. 203, 45 Am. Bankr. Rep. 412; In re Levy (D. C.) 261 Fed. 432, 44 Am. Bankr. Rep. 248.

a court of bankruptcy having jurisdiction, nor allow it to be impeached in any collateral proceeding for any cause which would have prevented the granting of the discharge or which would have been sufficient ground for revoking the discharge in the bankruptcy court.[606] It was ruled in some of the decisions under earlier bankruptcy laws that the jurisdiction of the court granting the discharge was open to question, and that a party interested in avoiding the effect of the discharge should be permitted to show, in a collateral proceeding, that it was granted without jurisdiction.[607] But this view has been controverted by authorities of perhaps quite equal authority,[608] and is contrary to the general rules protecting judgments against collateral attack. The proper rule is that all legal presumptions must be indulged in favor of the order of discharge, and that it cannot be held void in a collateral proceeding unless want of jurisdiction in the court which granted it appears affirmatively on the face of the record,[609] or that if the bankruptcy court had jurisdiction of the subject-matter, by reason of the filing of a petition which (aided by every presumption and inference) can be held sufficient to confer jurisdiction, then the discharge must be conclusively presumed valid.[610] Further, it must be remembered that a proceeding in bankruptcy is a proceeding in rem. And therefore a discharge granted by a court having jurisdiction of the estate cannot be treated by any other court as void as to any particular creditor, on

[606] United States v. Griswold, 7 Sawy. 311, 8 Fed. 556; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Young v. Stevenson, 73 Ark. 480, 84 S. W. 623; Lutz v. Kalmus, 115 N. Y. Supp. 230; Delta County Bank v. McGranahan, 37 Wash. 307, 79 Pac. 796; First Nat. Bank v. Masterson, 29 Okl. 76, 116 Pac. 162; Parker v. Atwood, 52 N. H. 181; Corey v. Ripley, 57 Me. 69, 2 Am. Rep. 19, 4 N. B. R. 503; Alston v. Robinett, 37 Tex. 56, 9 N. B. R. 74; Howland v. Carson, 28 Ohio St. 625, 16 N. B. R. 372; Milhous v. Aicardi, 51 Ala. 594; Fuller v. Pease, 144 Mass. 390, 11 N. E. 694; Talbott v. Suit, 68 Md. 443, 13 Atl. 356; Way v. Howe, 108 Mass. 502, 11 Am. Rep. 386, 4 N. B. R. 677; Blair v. Hanna, 87 Ind. 298; Brown v. Covenant Mut. Life Ins. Co., 86 Mo. 51; Brady v. Brady, 71 Ga. 71; Begein v. Brehm, 123 Ind. 160, 23 N. E. 496; Lawver v. Gladden (Pa.) 1 Atl. 659; Thurmond v. Andrews, 10 Bush (Ky.) 400; Stetson v. Bangor, 56 Me. 286; Smith v. Ramsey, 27 Ohio St. 339; Seymour v. Street, 5 Neb. 85; Oates v. Parish, 47 Ala. 157; Sheets v. Hawk, 14 Serg. & R. (Pa.) 173; Thomas v. Jones, 39 Wis. 124. But see Andrus v. Cornwell, 134 La. 403, 64 South. 221, for an intimation that a discharge in bankruptcy may be impeached in a state court on the ground of its being an absolute nullity.

[607] Poillon v. Lawrence, 77 N. Y. 207; Crouse v. Whittlesey, 61 Hun, 622, 15 N. Y. Supp. 851; Stiles v. Lay, 9 Ala. 795; Smith v. Engle, 44 Iowa, 265, 14 N. B. R. 481; Landly v. Cummings, 5 Ky. Law Rep. 511; Hennessee v. Mills, 1 Baxt. (Tenn.) 38.

[608] Morrison v. Woolson, 23 N. H. 11; Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Laidley v. Cummings, 83 Ky. 606.

[609] Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028; Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

[610] Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028; Jones v. Knox, 51 Ala. 367.

the theory that the court never acquired jurisdiction of his person because he was not served with notice of the proceedings, and this, although his name was purposely omitted from the list of creditors, or although the omission to serve him with notice was fraudulent and intentional.[611]

Neither is it permissible, in any collateral proceeding, to impeach a discharge in bankruptcy on the ground of fraud practised by the bankrupt in obtaining it (though directed against the particular creditor who complains) or on the ground of a fraudulent concealment of assets or other fraudulent conduct of the bankrupt, since the remedy for these matters is to be sought in the court of bankruptcy and there alone.[612] At any rate, it is clear that a creditor who has unsuccessfully opposed the bankrupt's application for discharge is thereby estopped, in a suit which he afterwards brings to recover his debt, and to which the defendant pleads his discharge, from showing that the discharge was fraudulently obtained.[613] And for even stronger reasons, no mere irregularities of practice or errors of law alleged to have been committed by the court of bankruptcy can be set up to avoid the effect of the discharge. It cannot be questioned in any other court for any lack of conformity to the provisions of the bankruptcy law, or as having been wrongly, improperly, or irregularly allowed.[614] On the contrary, if the plea setting up the discharge shows the court to have had jurisdiction of the petition, and to have proceeded, on the petition, to grant the discharge, all the intermediate steps will be presumed to have been duly and regularly taken.[615]

But it is always permissible for a creditor to avoid the effect of a discharge in bankruptcy as to his particular claim (without questioning its validity), by showing that his debt is one of the kind expressly excepted by law from the operation of a discharge, as, for instance,

[611] Allen v. Thompson, 10 Fed. 116; Benedict v. Smith, 48 Mich. 593, 12 N. W. 866; Thornton v. Hogan, 63 Mo. 143; Williams v. Butcher, 12 N. B. R. 143; Sawyer v. Rector, 5 Dak. 110, 37 N. W. 741; Brown v. Kroh, 31 Ohio St. 492; Bailey v. Corruthers, 71 Me. 172; Black v. Blazo, 117 Mass. 17, 13 N. B. R. 195. Contra, see Batchelder v. Low, 43 Vt. 662, 5 Am. Rep. 311, 8 N. B. R. 571; Jones v. Knox, 51 Ala. 367.

[612] Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Smith v. Ramsey, 27 Ohio St. 339, 15 N. B. R. 447; Rayl v. Lapham, 27 Ohio St. 452, 15 N. B. R. 508; Oates v. Parish, 47 Ala. 157; Ewell v. Pitman (Ky.) 27 S. W. 870; Farr v. Evans, 26 Pittsb. Leg. J. (Pa.) 141; Morris v. Creed, 11 Heisk. (Tenn.) 155; Brown v. Causey, 56 Tex. 340; Seymour v. Street, 5 Neb. 85; Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677; Wales v. Lyon, 2 Mich. 276. Contra, see Gupton v. Connor, 11 Humph. (Tenn.) 287; Bond v. Baldwin, 9 Ga. 9; Shelton v. Pease, 10 Mo. 473.

[613] Wales v. Lyon, 2 Mich. 276.

[614] Grover v. Fox, 36 Mich. 463; Marshall v. Sumner, 59 N. H. 218, 47 Am. Rep. 194; Hudson v. Bigham, 12 Heisk. (Tenn.) 58, 8 N. B. R. 494; Dusenbury v. Hoyt, 45 How. Prac. (N. Y.) 147; Sinclair v. Smyth, 1 Brev. (S. C.) 402.

[615] Morrison v. Woolson, 29 N. H. 510; Hubbell v. Cramp, 11 Paige (N. Y.) 310.

that it was created by the bankrupt by fraud or while acting in a fiduciary capacity,[616] or that the creditor had no knowledge of the proceedings in time to file his claim for proof and allowance.[617] This does not amount to an attack upon the discharge, either direct or collateral, since it admits its validity, and only seeks to withdraw the particular claim from its operation, in accordance with the provisions of the bankruptcy law.

The foregoing principles are also applicable in cases where the bankrupt is discharged on a composition with his creditors. Thus where, in proceedings in a court of competent jurisdiction for the discharge of a debtor on a composition, the decree is based on a finding that the bankrupt has not been guilty of any of the acts which would bar his discharge, nor of a failure to perform any of the duties necessary to secure it, which finding was essential to the exercise of the court's jurisdiction, the decree will be binding as to such matters on all parties to the proceeding until properly set aside, and cannot be collaterally impeached.[618]

§ 713. Pleading Discharge; Necessity of Pleading.—Since a discharge in bankruptcy does not destroy or extinguish the debts upon which it operates, and since it is a defense personal to the debtor and which he may waive,[619] it follows that the bankrupt, if he wishes to avail himself of the benefit of his discharge in any particular suit, must plead it properly and seasonably, and if he omits to do so, it constitutes no bar to the rendition of a valid judgment against him.[620] Thus, if

[616] Sutherland v. Lasher, 41 Misc. Rep. 249, 84 N. Y. Supp. 56; Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577; Stevens v. Brown, 49 Miss. 597, 11 N. B. R. 568; Linn v. Hamilton, 34 N. Y. Law. 305; Broadnax v. Bradford, 50 Ala. 270. To allege that a given claim is not discharged because it was not duly scheduled in the bankruptcy proceedings is not a collateral attack on the discharge. Hyde Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110. An action by a creditor on his debt against the bankrupt would not be a collateral attack on the discharge. Collins v. Davidson, 34 Ohio Cir. Ct. R. 668

[617] Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331.

[618] Hoskins v. Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

[619] Taber v. Donovan, 156 Mich. 652, 121 N. W. 481; Ludeling v. Felton, 29 La. Ann. 719; Manwarring v. Kouns, 35 Tex. 171; Horner v. Spelman, 78 Ill. 206; Goodrich v. Hunton, 2 Woods, 137, Fed. Cas. No. 5,544.

[620] In re Nuttall, 201 Fed. 557, 29 Am. Bankr. Rep. 800; In re Boardway, 248 Fed. 364, 41 Am. Bankr. Rep. 478; Fowle v. Park, 48 Fed. 789; Doggett v. Emerson, 1 Woodb. & M. 195, Fed. Cas. No. 3,962; Fellows v. Hall, 3 McLean, 281, Fed. Cas. No. 4,722; City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943; Schreiber v. Schomacker Piano Forte Mfg. Co., 152 App. Div. 817, 137 N. Y. Supp. 747; Griffith v. Adams, 95 Md. 170, 52 Atl. 66; McDougald v. Chatanooga Medicine Co., 10 Ga. App. 653, 73 S. E. 1089; Friedman v. Zweifler, 74 Misc. Rep. 448, 132 N. Y. Supp. 320; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Lovell v. Sneed, 79 Ark. 204, 95 S. W. 157; Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794; Collins v. Mc-

the defendant in an action fails to plead his discharge in bankruptcy and permits a judgment to go against him, he cannot afterwards, on the ground of the discharge, have relief in equity against any proceedings founded on the judgment, as, by enjoining the levy of execution thereunder.[621] Nor can he have the judgment set aside, in order to enable him to plead his discharge,[622] though it was formerly held in Alabama, and perhaps is still the law in that state, that where a bankrupt is sued before a justice of the peace and omits then to plead his discharge, it is nevertheless a good defense on an appeal by him to the circuit court.[623] And a discharge in bankruptcy must be pleaded affirmatively in a proceeding by scire facias to revive a judgment, as well as in an original suit.[624] So again, where a suit is pending against several defendants, and one of them obtains his discharge in bankruptcy but does not plead it, and judgment is rendered against them all and the amount is paid by one of the other defendants, the latter is entitled to enforce contribution from the bankrupt.[625] And it should be noted that the court of bankruptcy cannot and will not do anything to relieve a defendant who, failing to plead his discharge in a suit in another court on a dischargeable debt, suffers a judgment.[626] Furthermore, laches in making an application for leave to plead a discharge in bankruptcy is a sufficient ground for denying such application.[627] So, where the defendant in a suit filed an answer which made no reference to the fact that he had been discharged in bankruptcy, and first brought that fact

Walters, 35 Misc. Rep. 648, 72 N. Y. Supp. 203; Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 492; Collins v. Hammock, 59 Ala. 448; Brown v. J. & E. Stevens Co., 52 Conn. 110; Smith v. Cook, 71 Ga. 705; Horner v. Spelman, 78 Ill. 206; Jenks v. Opp, 43 Ind. 108; Palmer v. Moore, 3 La. Ann. 208; Ludeling v. Felton, 29 La. Ann. 710; Jones v. Coker, 53 Miss. 195; Bank of Missouri v. Franciscus, 15 Mo. 303; Cronell v. Dakin, 38 N. Y. 253; Gardner v. Hengehold, 6 Ohio Dec. 997; Park v. Casey, 35 Tex. 536; Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221; Finney v. Mayer, 61 Ga. 500; Gallaher v. Michel, 26 La. Ann. 41; Hollister v. Abbot, 31 N. H. 442, 64 Am. Dec. 342; Steward v. Green, 11 Paige (N. Y.) 535; Paschall v. Bullock, 80 N. C. 329; Bell v. Cunningham, 81 N. C. 83; Herschman v. Bolster, 220 Mass. 137, 107 N. E. 543; Drake v. Hodgson, 192 App. Div. 676, 183 N. Y. Supp. 486; Bryan v. Orient Lumber & Coal Co., 55 Okl. 370, 156 Pac. 897; Peoples Trust Co. v. Ehrhart, 56 Pa. Super. Ct. 101; First Nat. Bank v. Cootes, 74 W. Va. 112, 81 S. E. 844.

621 Goodrich v. Hunton, 2 Woods, 135, Fed. Cas. No. 5,544; Stone v. Schneider-Davis Co., 51 Tex. Civ. App. 517, 112 S. W. 133; Marsh v. Mandeville, 28 Miss. 122; Rahm v. Minis, 40 Cal. 421; White v. Powell, 38 Tex. Civ. App. 38, 84 S. W. 836. But see Bunting Stone Hardware Co. v. Alexander (Tex. Civ. App.) 190 S. W. 1152.

622 Mack Mfg. Co. v. Van Duerson, 138 Fed. 953.

623 McCrary v. Mabe, 7 Ala. 356.

624 In re Wesson, 88 Fed. 855; Spring Run Coal Co. v. Tozier, 102 Pa. St. 342; Stewart v. Colwell, 24 Pa. St. 67; Duncan v. Hargrove, 22 Ala. 150.

625 Brown v. J. & E. Stevens Co., 52 Conn. 110.

626 In re Ferguson, 2 Hughes, 286, 16 N. B. R. 530, Fed. Cas. No. 4,738

627 Medbury v. Swan, 46 N. Y. 200, 8 N. B. R. 537.

to the attention of the court by a motion in arrest of judgment, three weeks after a verdict had been returned against him, and did not attempt to plead his discharge in bar until nearly seven months after the verdict, it was held that he had waived his right to do so.[628] But of course the case is otherwise where the bankrupt has had no opportunity to plead his discharge before judgment goes against him. Here he does not lose its protection by the rendition of a judgment on a dischargeable debt.[629] So, in a case where the failure to plead the discharge was due to the fact that the attorney representing the defendant in that litigation was unaware of it, it was held that leave might be granted to vacate the judgment given against him and for him to plead the discharge, but only on terms including the payment of costs and disbursements.[630]

§ 714. Same; Who may Plead Discharge.—It is often said that a plea of discharge in bankruptcy is strictly personal to the debtor, that he may waive the benefit of his discharge by failing to plead it, and that if he chooses to do so, no one can plead the discharge for him.[631] And the cases are no doubt correct in holding that the plea cannot be set up by a co-defendant in the action,[632] nor by one who is in possession of property of the debtor, transferred with an intent to defraud creditors, in an action to set aside such transfer.[633] But on the other hand the plea of a discharge in bankruptcy can certainly be made by the personal representatives of the debtor, and indeed it is held that his administrator cannot waive the benefit of the discharge by failing to plead it.[634] So it may be pleaded by the heirs of the bankrupt, or by his widow in an action to recover land formerly belonging to the bankrupt and transferred to her through the agency of a third person.[635] And the plea is also permissible when interposed by a surety of the bankrupt, in respect to the transaction out of which the surety's liability is supposed to grow.[636] And again, where the question respects the discharge as affecting a lien on property, the plea can be urged by

[628] Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794.

[629] Ewing v. Peck, 17 Ala. 339; Brown v. Branch Bank of Montgomery, 20 Ala. 420; Milhous v. Alcardi, 51 Ala. 594.

[630] De Marco v. Mass, 31 Misc. Rep. 827, 64 N. Y. Supp. 768.

[631] Bush v. Stanley, 122 Ill. 406, 13 N. E. 249; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; First International Bank v. Lee (N. D.) 141 N. W. 716; Alabama Great Southern Ry. Co. v. Crawley, 118 Miss. 272, 79 South. 94.

[632] George Bohon Co. v. Moren & Sipple, 151 Ky. 811, 152 S. W. 944.

[633] Dewey v. Moyer, 9 Hun (N. Y.) 473, 16 N. B. R. 1.

[634] Parker v. Grant, 91 N. C. 338; Wheatman v. Andrews, 85 N. J. 107, 89 Atl. 285.

[635] Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

[636] McDonald v. State, 77 Ind. 26; Boule v, Pucket, 7 Humph. (Tenn.) 169.

any one claiming an interest in the property adverse to the lien asserted.[637] Finally, where the object of the plea is not to show the bankrupt's immunity from liability for his past debts, but to show (as a fact relevant to the issue on trial) that the claim of a particular creditor was released or extinguished by the discharge, it may be alleged as matter of fact by any party who finds it a necessary part of his claim or defense.[638]

§ 715. **Same; Form and Effect of Plea.**—The mode of pleading a discharge in bankruptcy is to be determined by the mode of pleading in the state courts.[639] And it must be remembered that a state court has the right to proceed with any case pending before it until the discharge is brought to its notice by a proper and sufficient plea.[640] As to the general sufficiency of a plea of this kind, there has been much conflict of opinion as to whether it is necessary to show the jurisdiction of the bankruptcy court. Numerous decisions have maintained that the plea is not sufficient unless it sets forth the facts on which jurisdiction both of the subject-matter and of the person depend.[641] But other cases have ruled that this is not necessary, in view of the fact that an order of discharge in bankruptcy is a judgment of a court of general jurisdiction, the federal district courts, sitting in bankruptcy, not being courts of limited or local jurisdiction in such sense that their judgments must show the facts essential to jurisdiction.[642] And where the state law provides that a judgment may be pleaded by stating that it was duly given or made, a plea alleging that the defendant was "duly adjudged" a bankrupt in a designated federal court sufficiently alleges the jurisdiction of that court.[643] Generally speaking, however, it is necessary

637 Fleitas v. Mellen, 39 Fed. 129.

638 Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

639 Landly & Co. v. Cummings, 5 Ky. Law Rep. 511. And see Wheeler v. Newton, 168 App. Div. 782, 154 N. Y. Supp. 431. A discharge in bankruptcy is provable in an action for conversion of stocks and bonds under a plea of not guilty. Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120.

640 Bennett v. Lewis, 66 S. W. 523, 23 Ky. Law Rep. 2037. Whether a judgment against one who is thereafter adjudged a bankrupt is thereby discharged is a question properly raised by pleading the discharge in a proceeding to enforce the judgment, and not by a petition in the bankruptcy court to enjoin the judgment creditor from enforcing it. Hellman v. Goldstone, 161 Fed. 913, 20 Am. Bankr. Rep. 539.

641 Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 492; Ruckman v. Cowell, 1 N. Y. 505; Sackett v. Andross, 5 Hill (N. Y.) 327; Stephens v. Ely, 6 Hill (N. Y.) 607; Stow v. Parks, 1 Chand. (Wis.) 60; Wiggins v. Shapleigh, 20 N. H. 444; Morse v. Presby, 25 N. H. 299; Landly & Co. v. Cummings, 5 Ky. Law Rep. 511.

642 Rowan v. Holcomb, 16 Ohio, 463; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Bryant v. Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; Hays v. Ford, 55 Ind. 52; Cromwell v. Burr, 59 How. Prac. (N. Y.) 93.

643 Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

for the plea to name the court in which the discharge was granted,[644] and it is proper and prudent, even if not strictly necessary, to aver the filing of the petition in bankruptcy, that being the fundamental jurisdictional fact,[645] and to state the date of the filing of such petition, if it has any bearing on the availability of the discharge as a defense to the claim in suit.[646] And on the same principle, the careful pleader will not omit to allege the residence or domicile of the bankrupt within the territorial jurisdiction of the bankruptcy court for the requisite length of time.[647] But a defect in a plea of bankruptcy, in failing to set forth such facts as will show the jurisdiction of the court, may be waived by pleading over.[648] But assuming the jurisdiction of the court to have been shown, and that the plea distinctly alleges that the defendant has been discharged by the judgment of the proper court, and has received his certificate of discharge, which allegations are necessary,[649] it is not necessary to allege all the different proceedings had to entitle him to his discharge,[650] as, for instance, that the requisite notices had been given to the creditors and others interested before the discharge was granted,[651] but the plea will be good if it sets out the order of discharge after a "taliter processum est" or other equivalent form of allegation.[652] For the court, at least in passing on a demurrer to a plea or answer setting up a discharge in bankruptcy, will assume that every step in the bankruptcy proceedings prior to and at the time of the discharge was in all respects regular and complied with every requirement of the statute.[653]

Next, it is necessary for the plea of a discharge in bankruptcy to show that the claim or debt in suit, and to which it is interposed as a defense, was a provable debt in the bankruptcy proceedings, and this should be done by alleging that it was listed in the bankrupt's schedules,

[644] Morrison v. Woolson, 29 N. H. 510; Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 492. Compare Preston v. Simmons, 1 Rich. L. (S. C.) 262.

[645] Cutter v. Folsom, 17 N. H. 139; Wiggins v. Shapleigh, 20 N. H. 444; Price v. Bray, 21 N. J. Law, 13; McCormick v. Pickering, 4 N. Y. 276.

[646] House v. Johnson, 19 Colo. App. 524, 76 Pac. 743; Stephenson v. Bird, 168 Ala. 363, 53 South. 93, Ann. Cas. 1912B, 249.

[647] Cutter v. Folsom, 17 N. H. 139; Wiggins v. Shapleigh, 20 N. H. 444; McCormick v. Pickering, 4 N. Y. 276; Price v. Bray, 21 N. J. Law, 13.

[648] Price v. Bray, 21 N. J. Law, 13.

[649] Hayes v. Flowers, 25 Miss. 169; City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943. Compare Weld v. Locke, 18 N. H. 141.

[650] White v. How, 3 McLean, 291, Fed. Cas. No. 17,549; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; Johnson v. Ball, 15 N. H. 407; Wiggins v. Shapleigh, 20 N. H. 444; McCormick v. Pickering, 4 N. Y. 276; Preston v. Simons, 1 Rich. L. (S. C.) 262; Downer v. Chamberlin, 21 Vt. 414.

[651] Weld v. Locke, 8 N. H. 141; Wiggins v. Shapleigh, 20 N. H. 444; State v. Gaston, 52 N. J. Law, 321, 19 Atl. 608; McCormick v. Pickering, 4 N. Y. 276.

[652] Price v. Bray, 21 N. J. Law, 13.

[653] Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 Am. Bankr. Rep. 751.

or, if not so listed, that the creditor had notice or knowledge of the bankruptcy proceedings in time to prove his claim and have it allowed.[654] And the plea should show that the demand in suit was not contracted after the defendant was adjudicated a bankrupt.[655] But it is not necessary for the defendant to allege or show that the debt in question is not one of those excepted from the operation of the bankruptcy act. If the plaintiff contends that the debt was of a fiduciary character, contracted in fraud, for willful injury to the person, etc., it is for him to allege this fact in reply, but not for the defendant to negative it in advance.[656]

A plea of the defendant's bankruptcy should conclude with a verification,[657] and a certificate of the discharge should be filed with the plea,[658] but the court cannot dismiss the action merely on the filing of such a plea, but must submit the issue to the jury.[659] And a debtor will be estopped from pleading in bar, in a suit in a state court, a discharge in bankruptcy obtained pendente lite, where he fraudulently concealed from his creditor the pendency of the proceedings in bankruptcy until after the discharge was granted, and the creditor had no actual notice of the pendency of such proceedings.[660] A defective plea of discharge in bankruptcy is amendable on terms.[661]

In an action at law, if the suit was begun before the discharge in bankruptcy and is pending, the proper method of setting up the discharge in bar is by a plea "puis darrein continuance," or by such form of answer as is equivalent thereto under the modern forms of pleading.[662] If the proceeding is in equity, the discharge, granted since the

[654] Currier v. King, 81 Vt. 285, 69 Atl. 873; Balk v. Harris, 130 N. C. 381, 41 S. E. 940; Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S. E. 56; Bennett v. Lewis, 66 S. W. 523, 23 Ky. Law Rep. 2037; Biela v. Urbanczyk, 38 Tex. Civ. App. 213, 85 S. W. 451; Reinhardt v. Friederich, 58 Ind. App. 421, 108 N. E. 258. But compare B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 South. 815; Morrison v. Woolson, 23 N. H. 11; Harrington v. McNaughton, 20 Vt. 293.

[655] Fowler v. Michael (Tex. Civ. App.) 81 S. W. 321.

[656] Rowan v. Holcomb, 16 Ohio, 463; State v. Beck, 175 Ind. 312, 93 N. E. 664; McNeil v. Knott, 11 Ga. 142; Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Wiggins v. Shapleigh, 20 N. H. 444; McCabe v. Cooney, 2 Sandf. Ch. (N. Y.) 314; Stow v. Parks, 1 Chand. (Wis.) 60. Contra, see Jordan v. Gatewood, Smith (Ind.) 82; Bivens v. Newcomb, 2 Ind. 98; Frost v. Tibbetts, 30 Me. 188; Hayes v. Flowers, 25 Miss. 169; Sackett v. Andross, 5 Hill (N. Y.) 327; Maples v. Burnside, 1 Denio (N. Y.) 332.

[657] Kirby v. Garrison, 21 N. J. Law, 179; Stoll v. Wilson, 38 N. J. Law, 198; Patrick v. Brown, 7 Phila. (Pa.) 133; Mayer v. Gimbel, 9 Phila. (Pa.) 90; Downer v. Chamberlin, 21 Vt. 414.

[658] Stoll v. Wilson, 38 N. J. Law, 198.

[659] Austin v. Markham, 44 Ga. 161, 10 N. B. R. 548; Cooper v. Cooper, 9 N. J. Eq. 566.

[660] Batchelder v. Low, 43 Vt. 662, 5 Am. Rep. 311, 8 N. B. R. 571.

[661] McNeil v. Knott, 11 Ga. 142; Stoll v. Wilson, 38 N. J. Law, 198; Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 494.

[662] Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332; Platt v. Cole, 5 Fed. 260; Penn v. Edwards, 50 Ala. 63; Keene v. Mould, 16 Ohio, 12; Humble v.

commencement of the suit, may be set up by a supplemental answer,[663] or, according to some of the authorities, by a cross-bill.[664] But where a defendant, before judgment against him, has suggested his bankruptcy, and filed a written motion for a continuance, he may, on subsequently obtaining a review, plead his discharge in bankruptcy in bar of the action.[665] In a proper case, the court may impose terms on granting an application for leave to plead a discharge in bankruptcy obtained pending the suit, as, a waiver of any costs up to the time of setting up the defense.[666]

If the defendant in an action pleads his discharge in bankruptcy, and the plaintiff means to contend that the discharge does not release his claim, because it belongs to one of the classes of debts expressly excepted by the statute, he should set up this matter by a replication.[667] And the same course is proper where he means to avoid the effect of the discharge by showing a new promise on the part of the defendant to pay the debt in suit.[668] But where, in a suit on a note, the answer sets up a discharge in bankruptcy before suit, it does not justify a reply that the money for which it was given was obtained on false pretenses.[669]

§ 716. Evidence as to Discharge.—Where one who has received a discharge in bankruptcy is sued on a debt existing at the time of the filing of the petition, the introduction of the order of discharge makes out a prima facie defense, and casts the burden on the plaintiff to show that, because of the nature of the claim, the failure to give notice, or some other statutory reason, the debt sued on was by law excepted from the operation of the discharge.[670] It is therefore an established general rule that, when a discharge in bankruptcy is pleaded in defense to an action, and the plaintiff contends that the discharge is not operative as to his debt, or that, for any reason, he is not bound by it, the burden is on him to establish this fact.[671] Thus, it is not incumbent on

Carson, 6 N. B. R. 84. See Boshes v. Kamin, 209 Ill. App. 508.

[663] Kahn v. Casper, 51 App. Div. 540, 64 N. Y. Supp. 838; Holyoke v. Adams, 1 Hun (N. Y.) 223, 10 N. B. R. 270.

[664] Banque Franco-Egyptienne v. Brown, 24 Fed. 106.

[665] Todd v. Barton, 117 Mass. 291, 13 N. B. R. 197.

[666] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

[667] Kellogg v. Kimball, 138 Mass. 441; Cooper Grocery Co. v. Blume (Tex. Civ. App.) 156 S. W. 1157; Cogburn v. Spence, 15 Ala. 549. 50 Am. Dec. 140; Stewart v. Hargrove, 23 Ala. 429; Brereton v. Hull, 1 Denio (N. Y.) 75. Compare Shelton v. Pease, 10 Mo. 473.

[668] Young v. Denslinger, 2 Ill. App. 22.

[669] Strauch v. Flynn, 108 Minn. 313, 122 N. W. 320.

[670] Schwelgert-Ewald Lumber Co. v. Bauman, 42 N. D. 221, 172 N. W. 808; Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776.

[671] Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Manheim v. Loewe, 185 App. Div. 601, 173 N. Y. Supp. 260. Compare Hyde

the bankrupt, in the first instance, to show that the claim sued on was provable in the bankruptcy proceedings, where it appears on its face to be so provable.[672] But the bankrupt pleading his discharge,—and more especially when he relies on it as a basis for affirmative relief, such as the cancellation of a judgment against him,—must assume the burden of showing either that the debt was duly listed in his schedule, or else that the creditor had notice or actual knowledge of the bankruptcy proceedings in time to have filed his claim and procured its allowance.[673] And included in this is the necessity of identifying the claim now in suit with the one listed in the schedule.[674] If the debt was actually scheduled and is identified, then it is not incumbent on the bankrupt to show that the creditor had notice or knowledge of the proceedings in bankruptcy, for the law raises a presumption of such notice or knowledge.[675] But on the other hand, while a debt or claim omitted from the schedule may still be barred by the discharge, yet the burden in this case is on the bankrupt to show that the creditor had such timely notice or actual knowledge of the bankruptcy proceedings as is necessary under the statute to bring about this result.[676] But again, the presumption is that all scheduled debts are released by the discharge, and hence if a creditor, suing after the discharge, contends that his particular claim is not affected, because within one of the classes specially excepted by the statute, as having been created by fraud, embezzlement, defalcation of a trustee, etc., then he must assume the burden of proving this contention.[677]

Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110.

[672] Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537. But see Baker v. Hughes, 5 Ga. App. 586, 63 S. E. 587.

[673] Weidenfeld v. Tillinghast, 54 Misc. Rep. 90, 104 N. Y. Supp. 712; Graber v. Gault, 103 App. Div. 541, 93 N. Y. Supp. 76; Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537; Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331; Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App.) 182 S. W. 678; Bunting Stone Hardware Co. v. Alexander (Tex. Civ. App.) 190 S. W. 1152. Contra, see Alling v. Straka, 118 Ill. App. 184; Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

[674] Kreitlein v. Ferger (Ind. App.) 97 N. E. 819; B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 South. 815; Anthony v. Sturdivant, 174 Ala. 521, 56 South. 571. But see King v. Kellogg, 114 Miss. 375, 75 South. 134.

[675] New York Institution for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Stevens v. King, 16 App. Div. 377, 44 N. Y. Supp. 893; Claflin v. Wolff, 88 N. J. Law, 308, 96 Atl. 73; Merchants' Bank of Brooklyn v. Miller, 176 App. Div. 412, 162 N. Y. Supp. 999.

[676] George F. Sloan & Bro. v. Grollman, 113 Md. 192, 77 Atl. 577; Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404; Smith v. Hill, 232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667. Where the scheduling of a claim by the bankrupt was faulty, in naming the original creditor after the claim had been assigned, the bankrupt has the burden of showing due diligence to ascertain and state the true owner of the claim. Lansing Liquidation Corp. v. Heinze, 184 App. Div. 129, 171 N. Y. Supp. 738. Though the name of a creditor was inadvertently omitted from the schedule as filed, yet if he was afterwards added by an amendment duly allowed and was served with proper notice, the discharge will be conclusive upon him. Almond v. Coalson, 23 Ga. App. 797, 99 S. E. 707.

[677] Bailey v. Gleason, 76 Vt. 115, 56

As to the admissibility of evidence and the character of the evidence required, it is not necessary for a bankrupt pleading his discharge to prove each step in the bankruptcy proceedings. For the statute provides that a certified copy of an order granting a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[678] Where the claim in suit, and against which the discharge is pleaded, consists of a judgment, and it is contended that the judgment is excepted from the operation of the discharge because rendered in an action for fraud, this question must be determined by an inspection of the record of the action in which the judgment was rendered, and the showing made by such record is conclusive.[679] So also, if it is claimed that the judgment in question was for "willful and malicious injury to the person or property," the fact of its being based on such a cause of action may be shown by record evidence.[680] But where the plaintiff's claim has not been reduced to judgment, its character, as being within or without the excepted classes, is an issue of fact which must be determined upon competent and sufficient evidence and submitted to the jury. This rule applies where the plaintiff contends that the debt in question was created by

Atl. 537; In re Peterson, 137 App. Div. 435, 121 N. Y. Supp. 738; Thompkins v. Williams, 137 App. Div. 521, 122 N. Y. Supp. 152; Culver v. Torrey, 34 Misc. Rep. 793, 69 N. Y. Supp. 919; In re Peterson's Estate, 64 Misc. Rep. 217, 118 N. Y. Supp. 1077; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Gatliff v. Mackey, 104 S. W. 379, 31 Ky. Law Rep. 947; Hallagan v. Dowell (Iowa) 139 N. W. 883; Gregory v. Edgerly, 17 Neb. 374, 22 N. W. 703; Sherwood v. Mitchell, 4 Denio (N. Y.) 435; Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862; Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776.

[678] Bankruptcy Act 1898, § 21f. And see Nation v. Jones, 3 Ga. App. 83, 59 S. E. 330; United Society of Shakers v. Underwood, 74 Ky. (11 Bush) 265, 21 Am. Rep. 214; Hays v. Ford, 55 Ind. 52, 15 N. B. R. 569; Williams v. First Nat. Bank, 21 Ga. App. 182, 94 S. E. 73; Bank of La Fayette v. Phipps, 24 Ga. App. 613, 101 S. E. 696.

[679] Louisville & N. R. Co. v. Bryant, 149 Ky. 359, 149 S. W. 830; Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55; Halligan v. Dowell, 179 Iowa, 172, 161 N. W. 177. A recital in a judgment rendered by a state court that the debt for which it was rendered is a liability arising out of fraud is conclusive, if based on a pleading to that effect, that it is not released or discharged in bankruptcy. Young v. City Nat. Bank (Tex. Civ. App.) 223 S. W. 340. A judgment creditor having the burden of showing that his claim is not barred by a discharge in bankruptcy, the creditor's declaration, from which the nature of the claim appears, should be given the construction most favorable to the bankrupt. In re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210. Where the creditor's judgment, under the pleadings and the charge, might be based upon a contract or upon fraud or upon both, and there is nothing but the pleadings and the charge from which to determine the facts, the creditor does not sustain the burden of showing that his claim (duly scheduled in the bankruptcy proceedings) is excepted from the operation of the discharge. Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918.

[680] Flanders v. Mullin, 80 Vt. 124, 66 Atl. 789, 12 Ann. Cas. 1010. See Bazemore v. Stephenson, 24 Ga. App. 180, 100 S. E. 234.

the fraud of the bankrupt,[681] or by his false representations or false pretenses,[682] and also in cases where the effect of the discharge will depend upon whether or not the creditor had notice or knowledge of the proceedings in bankruptcy,[683] and where the bankrupt's contention is that a certain person was acting as the creditor's agent, so that his knowledge of the proceedings should be imputed to the creditor himself.[684]

§ 717. **Effect of Refusal of Discharge or Failure to Apply.**—If the bankrupt does not obtain his discharge, none of the proceedings in the bankruptcy case will in any way affect the demands of his creditors against him.[685] And a creditor who has proved his claim and accepted and received a dividend thereon is not estopped from collecting the remainder of his debt in any proper way, if the bankrupt is not discharged, but the dividend will merely reduce his cause of action pro tanto.[686] If the bankrupt fails to apply for a discharge, the order of the court approving the record and closing the case without granting a discharge is equivalent to a judgment by default in favor of the bankrupt's then existing creditors, and is res judicata in any subsequent bankruptcy proceeding, precluding him from obtaining a discharge therein from any debts previously scheduled,[687] and the fact that a claim so scheduled is afterwards reduced to judgment does not create a new debt which could form the basis for a subsequent bankruptcy proceeding and discharge therein.[688] So when the bankrupt's application for a discharge is denied, the right to sue him upon any existing claim revives.[689] And the refusal of a discharge renders the issue of his right to a discharge from any debts provable in that proceeding res judicata, so that he is not entitled to retry it in a second proceeding.[690] But a creditor who desires to rely upon the order refusing a discharge, as res

[681] Culver v. Torrey, 34 Misc. Rep. 793, 69 N. Y. Supp. 919.

[682] Atlanta Skirt Mfg. Co. v. Jacobs, 8 Ga. App. 299, 68 S. E. 1077.

[683] Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177; Bergmann v. Manes, 141 App. Div. 102, 125 N. Y. Supp. 973; Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436.

[684] Atkinson v. Elmore, 103 Mo. App. 403, 77 S. W. 492.

[685] Whitney v. Crafts, 10 Mass. 23; Chandler v. Windship, 6 Mass. 310; Lummus v. Fairfield, 5 Mass. 248. Where a bankrupt fails to obtain a discharge, creditors whose claims were proved are not affected by subsequent bankruptcy proceedings against him, which afford no ground for a stay of suits by them, nor are such suits barred by his discharge therein. In re Spangler (D. C.) 256 Fed. 62, 43 Am. Bankr. Rep. 63.

[686] Hamlin v. Hamlin, 3 Jones Eq. (56 N. C.) 191; American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583.

[687] In re Bramlett, 161 Fed. 588, 20 Am. Bankr. Rep. 402; In re Elby, 157 Fed. 935, 19 Am. Bankr. Rep. 734.

[688] In re Schnabel, 166 Fed. 383, 23 Am. Bankr. Rep. 22; In re Kuffler, 155 Fed. 1018, 19 Am. Bankr. Rep. 181.

[689] Storrs v. Plumb, 30 Hun (N. Y.) 319.

[690] In re Kuffler, 155 Fed. 1018, 19 Am. Bankr. Rep. 181; In re Schwartz (D. C.) 248 Fed. 841, 41 Am. Bankr. Rep. 246.

judicata in a second proceeding instituted some years later, must prove it or otherwise call it to the attention of the court of bankruptcy, and if he fails to do so, and a general discharge is granted in the second proceeding, a state court must give effect to it in any proceedings thereafter brought to enforce the creditor's claim.[691]

[691] Youngman v. Salvage, 21 N. D. 317, 130 N. W. 930, Ann. Cas. 1913C, 1181.

CHAPTER XXXIV

DEBTS AFFECTED BY DISCHARGE

§ 718. Debts and Liabilities Discharged, in General.—It is the purpose of the bankruptcy law to relieve an honest debtor, who complies with all its requirements, from the entire burden of his debts, as they existed at the time of the filing of the petition in bankruptcy, with the exception of a few carefully specified classes. Hence it is the general rule, apart from the exceptions referred to, that a discharge in bank-

ruptcy releases the debtor and his after-acquired property from all debts and liabilities which were provable in bankruptcy and which existed at the commencement of the proceedings.[1] And it is immaterial that a particular creditor did not prove his claim in the bankruptcy proceedings. If the claim was provable and the creditor had an opportunity to prove it, his omission to do so will not withdraw it from the operation of the discharge.[2] Further, a provable debt is none the less barred by a discharge granted without opposition because the bankrupt had been refused a discharge in a prior proceeding, on the objection of the same creditor, in respect of the same indebtedness, where the ground of the refusal does not appear.[3] And the refusal of a discharge in an insolvency proceeding does not necessarily withdraw a debt proved therein from the operation of a discharge in a later bankruptcy proceeding, though the debt is not proved.[4] But the claim or liability must be a provable debt at the time of the filing of the petition in bankruptcy. Hence if it does not accrue or mature until after that date, it is not affected by the discharge.[5] Further, it must answer the description of a provable debt as defined in the bankruptcy law, and hence a claim may not be affected by the discharge because not a "fixed liability absolutely owing" by the bankrupt,[6] or because it was uncertain or contingent,[7] or

[1] Bankruptcy Act 1898, § 17a; A. Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929; Meyer v. Bartels, 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Beyer v. Sadvoransky, 108 Misc. Rep. 463, 177 N. Y. Supp. 705; Nelson v. Petterson, 229 Ill. 240, 82 N. E. 229, 13 L. R. A. (N. S.) 912, 11 Ann. Cas. 178; Alling v. Straka, 118 Ill. App. 184; Drake v. Vernon, 26 S. D. 354, 128 N. W. 317; Thornburgh v. Madren, 33 Iowa. 380; Fleming v. Lullman, 11 Mo. App. 104; Lefler v. Hunt, 8 Blackf. (Ind.) 195; Magoon v. Warfield, 3 G. Greene (Iowa) 293; Talbott v. Suit, 68 Md. 443, 13 Atl. 356; Withers v. Stinson, 79 N. C. 341. But a discharge of a debtor in bankruptcy is only from personal liability for debts and claims against him. Robinson v. Tischler, 69 Fla. 77, 67 South. 565. Under the law of Georgia, nonpayment of rent is the gist of the summary remedy for eviction, and a discharge in bankruptcy of a debt existing on account of overdue rent is not "payment." Carter v. Sutton, 147 Ga. 496, 94 S. E. 760.

[2] In re Kuffler (D. C.) 153 Fed. 667, 18 Am. Bankr. Rep. 587.

[3] Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390, 19 Am. Bankr. Rep. 288.

[4] Dean v. Justices of Municipal Court, 173 Mass. 453, 53 N. E. 893. Debts existing under the Bankruptcy Act of 1867, and kept alive by subsequent judgments, were not excepted from the operation of the Bankruptcy Act of 1898. In re Herrman, 106 Fed. 987, 46 C. C. A. 77.

[5] Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. Supp. 323; Rice v. Murphy, 109 Me. 101, 82 Atl. 842; Wight v. Gottschalk (Tenn. Ch. App.) 48 S. W. 140. But a claim which is a "fixed liability" and "absolutely owing" is provable in bankruptcy, and therefore dischargeable, although not yet payable when offered for proof. Supra, § 502. Thus a claim for unpaid installments under the bankrupts' contract for the purchase of land is discharged by his discharge in bankruptcy. O. L. Schwencke Land & Inv. Co. v. Forster (Sup.) 171 N. Y. Sup. 140.

[6] Phenix Nat. Bank v. Waterbury, 197 N. Y. 161, 90 N. E. 435. And see, supra, § 491.

[7] Leader v. Mattingly, 140 Ala. 444, 37 South. 270. And see, supra, § 499.

because it was a claim for damages not liquidated in time for proof and allowance.[8] And it is only debts or liabilities which are released by the discharge, and hence it does not operate to prevent the prosecution of an appeal.[9] Subject to these conditions, however, and provided only that it constitutes a provable debt, the nature of the creditor's claim is not material, with respect to the operation of the discharge upon it. Thus, for instance, the discharge will release the bankrupt from liability for breach of a covenant of warranty in his deed, the breach occurring before the bankruptcy,[10] and from his liability as the maker of a note,[11] and from all personal liability on a judgment recovered against him.[12] It is the nature of the transaction, and not the form of action, which is looked to in order to determine whether a cause of action is released by a discharge in bankruptcy,[13] and a court will look behind a judgment in order to ascertain whether the claim on which it was founded was of a nature to be provable in bankruptcy and so dischargeable.[14] In effect, it is after the discharge is granted, and not before it, that questions of this kind must be determined. For the court of bankruptcy, in granting the discharge, will not undertake to limit it to any particular debts nor undertake to decide upon what claims it shall operate and what shall be excepted from it.[15]

§ 719. **Stockholders' Liabilities.**—The liability of one who has subscribed for stock in a corporation, or to whom stock not fully paid has been issued, to make good the unpaid balance of his subscription is a debt provable against him in bankruptcy, and therefore will be released by his discharge, even though the call on which the action is based is not made until after the discharge.[16] But it is otherwise in regard to the liability imposed by some state statutes on the stockholders or directors of insolvent corporations to be answerable for the debts of the company,

[8] Jim Pearce & Co. v. Fisher, 170 Ala. 456, 54 South. 164. See King v. Kellogg, 114 Miss. 375, 75 South. 134. And see, supra, § 500.

[9] Stockwell v. Silloway, 105 Mass. 517.

[10] Sweaney v. Baugher, 166 Ind. 557, 77 N. E. 1083; Mackenzie v. Miller, 7 Ky. Law Rep. 831; Bradford v. Russell, 79 Ind. 64. And see, supra, § 513.

[11] Blackwell v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.) 76 S. W. 454; Dundee Nat. Bank v. Strowbridge (Sup.) 184 N. Y. Supp. 257.

[12] J. B. Ellis & Co. v. Mobile, J. & K. C. R. Co., 166 Ala. 187, 51 South. 860; Otto Young & Co. v. Howe, 150 Ala. 157, 43 South. 488; Barnes Cycle Co. v. Haines, 69 N. J. Eq. 651, 61 Atl. 515.

[13] Nelson v. Petterson, 131 Ill. App. 443.

[14] In re Kalk (D. C.) 270 Fed. 627, 46 Am. Bankr. Rep. 597; In re Levitan (D. C.) 224 Fed. 241, 34 Am. Bankr. Rep. 789; Halligan v. Dowell, 179 Iowa, 172, 161 N. W. 177; Bever v. Swecker, 138 Iowa, 721, 116 N. W. 704.

[15] Hanan v. Long, 150 App. Div. 327, 134 N. Y. Supp. 786. See In re Westbrook, 186 Fed. 414, 26 Am. Bankr. Rep. 181.

[16] Carey v. Mayer, 79 Fed. 926, 25 C. C. A. 239; Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440. Compare Glenn v. Howard, 65 Md. 40, 3 Atl. 895.

or for debts contracted under certain circumstances or within a particular time. A liability of this kind is statutory and not contractual, and therefore is not released by the discharge of the stockholder or director in bankruptcy,[17] unless, indeed, it has been reduced to judgment before the granting of the discharge, or the extent of the liability of the bankrupt, as a stockholder or director, has been fixed by a decree against the company and its stockholders, in which case it appears that it becomes a provable debt in the bankruptcy proceedings, and therefore will be extinguished by the discharge.[18]

§ 720. Claims of Sureties for Bankrupt.—A person who is responsible for the bankrupt's debt or undertaking, in the character of a surety, guarantor, or indorser, has no provable claim against the bankrupt's estate until he has paid or in some way discharged the obligation on which he is liable, and hence if there is no breach of the obligation and no payment by the surety or indorser before the bankrupt's discharge, he may, notwithstanding the discharge, have recourse against the bankrupt for any sum which he is thereafter compelled to pay.[19] But there is also a provision in the bankruptcy act that whenever a creditor, whose claim against the estate in bankruptcy is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and, if he discharges such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor.[20] Hence it appears that a surety or indorser (not having yet paid the debt) has a provable claim in the bankruptcy in the event that the principal creditor omits to prove the claim, and if his demand or claim thus becomes provable, it will also be released by the discharge granted to the bankrupt.[21]

§ 721. Claims Against Bankrupt as Surety.—Where the liability of a bankrupt as a surety has become fixed, definite, and certain at the commencement of the proceedings in bankruptcy, it constitutes a prova-

[17] Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870; First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563. Contra, Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. Supp. 323; Richards v. Schwab, 101 Misc. Rep. 128, 167 N. Y. Supp. 535.

[18] Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793. And see Philadelphia & R. Coal & Iron Co. v. Hotchkiss, 82 N. Y. 471.

[19] Goding v. Roscenthal, 180 Mass. 43, 61 N. E. 222. And see, supra, § 500. But if there has been a definitive breach of the contract or obligation, and a demand made on the surety for damages, before the bankruptcy proceedings, he then has a provable claim against the bankrupt, which will be released by the discharge of the bankrupt, although judgment is not recovered against the surety or paid until after the discharge. Williams v. United States Fidelity & Guaranty Co., 236 U. S. 549, 35 Sup. Ct. 289, 59 L. Ed. 713, 34 Am. Bankr. Rep. 181.

[20] Bankruptcy Act 1898, § 571.

[21] Hayer v. Comstock, 115 Iowa, 187, 88 N. W. 351; Smith v. Wheeler, 55 App. Div. 170, 66 N. Y. Supp. 780.

ble debt against his estate, and therefore will be released by his discharge.[22] Thus, where the surety on an appeal bond becomes bankrupt and receives his discharge, after the rendition of a judgment on such appeal bond, the discharge is a defense to the enforcement of the judgment, and likewise to any debt or claim for the costs incurred by the judgment creditor in obtaining the judgment and defending the appeal.[23]

§ 722. **Claims for Alimony and Support of Wife or Children.**—The amendment to the bankruptcy act, adopted in 1903, expressly excepts from the operation of a discharge in bankruptcy "liabilities for alimony due or to become due, or for maintenance or support of wife or child."[24] But even before this amendment, it was the practically unanimous doctrine of the courts that a claim for alimony to a divorced wife was not a "debt" within the meaning of the bankruptcy law, and, not being provable as a debt, was not released by the bankrupt's discharge.[25] Nor was this based solely on the ground that a decree for alimony was always within the control of the court which rendered it. For it was also held that a discharge in bankruptcy is no bar to a claim based on a contract or agreement of the bankrupt to pay an annuity or fixed periodical sum to his divorced wife during her lifetime or until her remarriage.[26] For similar reasons, the discharge cannot be pleaded as a defense to a claim upon the bankrupt based on his liability to make an allowance or pay a fixed sum for the support of his minor children, whether such liability is imposed upon him by an order or decree of court,[27] as, for in-

[22] In re Sullivan (D. C.) 262 Fed. 574, 45 Am. Bankr. Rep. 131; McPhee v. United States, 64 Colo. 421, 174 Pac. 808; Hardy Buggy Co. v. Paducah Banking Co., 183 Ky. 776, 210 S. W. 452. And see supra, § 505.

[23] Coe v. Waters, 16 Colo. App. 311, 64 Pac. 1054.

[24] Bankruptcy Act 1898, § 17a, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[25] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Vadner (D. C.) 259 Fed. 614; In re Pyatt (D. C.) 257 Fed. 362, 42 Am. Bankr. Rep. 462; Turner v. Turner (D. C.) 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Anderson (D. C.) 97 Fed. 321, 5 Am. Bankr. Rep. 858; Egbers v. Egbers, 98 Wash. 531, 167 Pac. 1073; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Lemert v. Lemert, 72 Ohio St. 364, 74 N. E. 194, 106 Am. St. Rep. 621, 2 Ann. Cas. 914; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623; In re Williams, 208 N. Y. 32, 101 N. E. 853. And see supra, § 509.

[26] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; Schlessinger v. Schlessinger, 39 Colo. 44, 88 Pac. 970, 8 L. R. A. (N. S.) 863. Where a voluntary bankrupt listed in his schedule of debts a note given to his wife, and the contract between them provided that she should accept the note in satisfaction of such sum for maintenance and support as the court might award her in a divorce proceeding, or in satisfaction of a claim for support of herself and children, the liability evidenced by the note was not dischargeable in bankruptcy. Blackstock v. Blackstock (C. C. A.) 265 Fed. 249, 45 Am. Bankr. Rep. 192.

[27] Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265, 13 Am. Bankr. Rep. 1; In re Hubbard (D. C.) 98 Fed. 710, 3 Am. Bankr. Rep. 528; Rush v. Flood, 105 Ill. App. 182; In re Baker (D. C.) 96 Fed. 954, 3 Am. Bankr. Rep. 101.

stance, in a divorce suit or in bastardy proceedings, or is based upon his voluntary agreement to contribute to the support of his children remaining in the custody of his divorced wife.[28] But it is said that the obligation of a man to recompense his former wife for expenditures made, after she had remarried, for the benefit of their child, is like his obligation to recompense any other person who had contributed to the support of the child; it is merely a civil debt and is extinguished by the father's discharge in bankruptcy.[29] So the expression in the statute, "liabilities for maintenance or support of wife and child," does not refer to debts for goods purchased by the husband or parent, and used by the wife or child,[30] nor to a debt for medical attendance furnished to the wife or child of the bankrupt at his request, and while the normal family relations subsist between him and the recipient of the services,[31] but both of such kinds of debts will be released by his discharge. And it has been ruled that, where the father of a bastard child has been ordered by the court to pay a monthly stipend for its support, and, on his refusal, a final money judgment has been rendered for the total amount due, the rights of the person entitled to recover under the order of filiation are merged in the judgment, and the judgment, being a provable debt in bankruptcy and not expressly excepted from the operation of the discharge, will be released by it.[32]

§ 723. Claims of Alien Creditors.—A discharge in bankruptcy under the act of Congress will constitute a bar to the claim of an alien creditor suing in any court within the United States, in the same manner and to the same extent as though he were a citizen of the United States. For the bankruptcy law has intra-territorial force throughout the United States, and hence if a foreign creditor seeks to employ the process of our courts in a manner or for a purpose not authorized by that law, that is, for the collection of a debt which is released by the bankrupt's discharge, he must be amenable to the lex fori.[33] But the bankruptcy law has no extra-territorial force, and therefore, notwithstanding a discharge granted under it, the foreign creditor would probably be entitled to pursue any appropriate remedies against the bankrupt or his property within the jurisdiction of the courts of his own country.

[28] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[29] Rush v. Flood, 105 Ill. App. 182.

[30] Schellenberg v. Mullaney, 112 App. Div. 384, 98 N. Y. Supp. 432.

[31] In re Ostrander, 139 Fed. 592, 15 Am. Bankr. Rep. 96.

[32] McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. Rep. 606.

[33] Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123; Ruiz v. Eickerman, 2 McCrary, 259, 5 Fed. 790; Pattison v. Wilbur, 10 R. I. 448, 12 N. B. R. 193; In re Zarega, 4 Law Rep. 480, Fed. Cas. No. 18,204; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52. Compare Moore v. Horton, 32 Hun (N. Y.) 393.

Particularly in regard to contracts, it may be said that: "According to the general doctrines of international law, the discharge of a contract by the law of the place where it is made is a discharge everywhere. Therefore, if a contract is made and to be performed in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defense to the contract, wherever the creditor may be domiciled, or wherever the contract may be put in suit. But in respect to contracts not made or to be performed within the country granting the discharge, it could of course have no extra-territorial validity, as against non-resident creditors, unless they came in and took part in the proceedings." [34]

§ 724. **Liabilities to State or United States.**—Although the question of the effect of a discharge in bankruptcy upon debts or liabilities of the bankrupt to a state has not often arisen in recent years, yet the authorities, so far as they go, are unanimous in holding that no financial claims of a state can be thus extinguished or released.[35] Also it was strongly held under the bankruptcy act of 1867 that a debt due to the United States is not barred by the bankrupt's discharge, although the government may prove its debt and have priority of payment over other creditors, and although the language of the clause relating to the effect of a discharge is general. This was held on the settled rule of construction that "the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign." [36] But it may be gravely doubted whether the United States is not so far named in the present bankruptcy act, and meant to be included therein, as that its claims shall be released by the discharge, except in the one instance specified. The language of the act is explicit. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are due as a tax levied by the United States," etc.[37] It seems an abso-

[34] 2 Black, Judgm. § 824.

[35] State v. Shelton, 47 Conn. 400; Commonwealth v. Hutchinson, 10 Pa. St. 466; Saunders v. Commonwealth, 10 Grat. (Va.) 494; Commonwealth v. Millen, 1 Ky. Law Rep. 270. An obligation on a forfeited bail bond is not provable in bankruptcy and not released by the bankrupt's discharge. In re Weber, 212 N. Y. 290, 106 N. E. 58.

[36] United States v. Herron, 20 Wall, 251, 22 L. Ed. 275; United States v. Rob Roy, 1 Woods, 42, 13 N. B. R. 235, Fed. Cas. No. 16,179; United States v. King, Wall. Sr. 13, Fed. Cas. No. 15,536; Hamilton v. Reynolds, 88 Ind. 191; Smith v. Hodson, 50 Wis. 279, 6 N. W. 812. Contra, see United States v. Davis, 3 McLean, 483, Fed. Cas. No. 14,929; United States v. Throckmorton, 8 N. B. R. 309, Fed. Cas. No. 16,516; United States v. Zerega, Fed. Cas. No. 16,786.

[37] Bankruptcy Act 1898, § 17a. And see United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409, 38 Am. Bankr. Rep. 880, holding that a claim against the bankrupt on his bond as a government contractor, if "absolutely owing" at the time of the bankruptcy, is a provable debt and therefore one which will be released by his discharge.

lutely necessary inference from this provision that if the United States holds any provable claim against a bankrupt, which is not for a tax, it will be released by his discharge, that is, of course, as to any balance which may remain unpaid after the government has been accorded its privilege of priority of payment. And in this connection, and as bearing significantly on the argument here advanced, it may be noted that the Supreme Court of the United States has decided that the general government's right of priority is no longer superior to the priority rights of all other classes of privileged creditors, but must be claimed and exercised in subordination to (at least) the claims for wages of labor.[38]

§ 725. Claims for Taxes.—It is expressly provided that a discharge in bankruptcy shall not release the bankrupt from any taxes levied by the state, county, district, or municipality "in which he resides."[39]. But it frequently happens that a bankrupt will own lands or personalty, on which there are taxes due and unpaid, in another state or in another county or municipality, that is, in a state, county, or municipality in which he does not reside. On the face of the statute, it would seem that such taxes must be proved as debts and share in dividends, and that they would be barred by a discharge, wholly if not proved, and as to any excess over dividends if proved. By another provision of the statute,[40] priority of payment is given to "taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality." Grammatically interpreted this means the United States, "the" state, "the" county, etc. And reading these two parts of the act together, as in pari materia, it appears that "the" state is "the state in which the bankrupt resides," and so as to the county or municipal corporation. But it is probable that the courts, in order to avoid a result which is so anomalous, and which Congress could scarcely be presumed to have intended, would so construe the statute as to give priority of payment to, and except from the operation of a discharge, taxes due to "any" state, county, etc. The bankruptcy act of 1867 gave priority to "all debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof." But it also provided that "nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any state."

As to assessments for local improvements, even if these are not to be considered taxes in such sense as to be saved from the operation of a bankrupt's discharge, yet they commonly attach as liens on the property affected, and such liens are not disturbed by the proceedings in bank-

[38] Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 573.

[39] Bankruptcy Act 1898, § 17a.

[40] Bankruptcy Act 1898, § 64.

ruptcy. But a judgment for costs in a criminal prosecution is not a debt "due as taxes" levied by the state, and consequently it is released by the discharge of the judgment debtor in bankruptcy.[41]

§ 726. **Debts and Claims Not Provable.**—The statute declares that a discharge in bankruptcy shall release the debtor from "all of his provable debts" with certain exceptions. Hence a discharge in bankruptcy is not a good defense except as to debts which were or might have been proved in the bankruptcy proceedings; and if a claim was not provable, it is not discharged, whether properly scheduled or not.[42] Now the nonprovable character of a debt may arise either out of the time of its accrual or out of its nature. As to the former condition, only such debts are provable (with certain minor exceptions) as existed at the date of the filing of the petition in bankruptcy. And therefore if a particular debt did not mature, or a particular liability did not attach, until after the filing of the petition, it is not provable and not dischargeable though it grows out of a contract or obligation antedating the petition in bankruptcy and which continues in effect.[43] Thus, for example, where the bankrupt is surety on a bond, and no breach of the condition of the bond has occurred until after his adjudication and discharge in bankruptcy, his liability on a subsequent breach is not affected by the discharge.[44] So where he has given a deed with covenants of warranty, his liability on a breach occurring before the commencement of the bankruptcy proceedings will constitute a provable debt, and so be released by the discharge.[45] But the mere probability, existing at the time of the bankruptcy, that a breach may occur does not make a provable debt,[46] and a breach actually occurring after the filing of the petition in bankruptcy creates a liability which is not affected by the discharge.[47] On the same principle, a promissory note given by a debtor after he has been adjudged a bankrupt, though before he is discharged, and though given for a debt which existed before the filing of the petition, is not released by his discharge.[48]

[41] Olds v. Forrester, 126 Iowa, 456, 102 N. W. 419.

[42] Smith v. McQuillin, 193 Mass. 289, 79 N. E. 401; National Mt. Wollaston Bank v. Porter, 122 Mass. 308; Pierce v. Wilcox, 40 Ind. 70; Drake v. Hodgson, 192 App. Div. 676, 183 N. Y. Supp. 486.

[43] Colman Co. v. Withoft, 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12; Holbrook v. Foss, 27 Me. 441; Robinson v. Pesant, 53 N. Y. 419, 8 N. B. R. 426; Cohen v. Pecharsky, 67 Misc. Rep. 72, 121 N. Y. Supp. 602; Stern v. Nussbaum, 47 How. Prac. (N. Y.) 489; Jersey City Ins. Co. v. Archer, 7 N. Y. St. Rep. 326.

[44] Paddleford v. State, 57 Miss. 118; Eastman v. Hibbard, 54 N. H. 504, 13 N. B. R. 360, 20 Am. Rep. 157.

[45] Merrill v. Schwartz, 68 Me. 514; Dow v. Davis, 73 Me. 288.

[46] Baker v. Hooks, 6 Ga. App. 121, 64 S. E. 573.

[47] Bush v. Cooper, 18 How. 82, 15 L. Ed. 273; Abercrombie v. Conner, 10 Ala. 293; French v. Morse, 2 Gray (Mass.) 111; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52. Compare Bates v. West, 19 Ill. 134.

[48] Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338; Donnell v. Swain, 2 Clark (Pa.) 134.

As to the case where the nature or origin of a debt or claim is such that it is not a provable debt in bankruptcy, this subject has already been discussed in detail.[49] But some further considerations may be here added, as specially pertinent to the question of the effect of a discharge. And in the first place, nothing can be provable in bankruptcy unless it is in the nature of a debt. Hence a discharge in bankruptcy does not release a grantor or mortgagor from the estoppel created by the covenants in his conveyance,[50] nor will it release a defendant in replevin, who has given a forthcoming bond, from a judgment requiring him to restore the property.[51] And an action on the case for deceit is not barred by a discharge in bankruptcy, although the measure of damages is ascertainable by reference to a contract.[52] So a discharge in bankruptcy is no defense to an action for unliquidated damages arising solely from a tort.[53] Again, the debtor cannot plead his discharge in defense to a claim which, at the time of the bankruptcy, was too uncertain or contingent to constitute a provable debt,[54] such as a claim for subsequently accruing rent under a lease held by the bankrupt as tenant, and which is not terminated by the adjudication in bankruptcy.[55] Neither will a discharge in bankruptcy release the bankrupt from payment of a fine imposed upon him by a court as part of the punishment for an offense of which he has been convicted,[56] or imposed as punishment for violation of an injunction or other contempt of court.[57] But where the claim of a creditor was inherently of such a nature as to be provable in the bankruptcy proceedings, the mere fact that it was subject to objection on the ground of the statute of limitations having run against it, and that it was disallowed on that ground, does not take it out of the class of provable claims so as to prevent the pleading of the discharge in bar of any subsequent proceeding to collect it.[58]

[49] Supra, §§ 487–523.

[50] Kezer v. Clifford, 59 N. H. 208.

[51] Robinson v. Soule, 56 Miss. 549. A discharge in bankruptcy is not a defense to an action of trover, brought by a seller against the bankrupt to recover personalty sold to the bankrupt under a contract retaining title until payment, where the bankrupt kept possession after the discharge, even though the seller may at the trial exercise his statutory privilege to take a money verdict. Smith v. Turner, 141 Ga. 313, 80 S. E. 993.

[52] Hughes v. Oliver, 8 Pa. St. 426.

[53] Hun v. Cary, 59 How. Prac. (N. Y.) 426, affirmed 82 N. Y. 65, 37 Am. Rep. 546.

[54] Clemmons v. Brinn, 36 Misc. Rep. 157, 72 N. Y. Supp. 1066; Lesser v. Gray, 8 Ga. App. 605, 70 S. E. 104; Johnson v. Worden, 47 Vt. 457, 13 N. B. R. 335.

[55] Bernhardt v. Curtis, 109 La. 171, 33 South. 125, 94 Am. St. Rep. 445; Scott v. Demarest, 75 Misc. Rep. 289, 135 N. Y. Supp. 264; Shapiro v. Thompson, 160 Ala. 363, 49 South. 391; Hamilton v. McCroskey, 112 Ga. 651, 37 S. E. 859.

[56] Ex parte O'Donnell, 1 Nat. Bankr. News, 59.

[57] Spalding v. New York, 4 How. 21, 11 L. Ed. 858; People v. Spalding, 10 Paige (N. Y.) 284. But a judgment for costs in a criminal prosecution is not a fine imposed as a punishment for an offense, and its discharge in bankruptcy is not contrary to public policy, as an interference with the course of justice in the criminal prosecution. Olds v. Forrester, 126 Iowa, 456, 102 N. W. 419.

[58] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225.

§ 727. **Debts Not Duly Scheduled.**—Under the bankruptcy act of 1867, it was held that a creditor holding a provable claim (not within the excepted classes) was barred by the bankrupt's discharge, although his name was omitted from the bankrupt's schedule or incorrectly given, in consequence of which he never had any actual notice of the bankruptcy proceedings, provided only that the omission or incorrect statement was not fraudulent and intentional.[59] But the severity of this rule has been much modified by the present statute. It is still true that the bankrupt will be released from a debt which was duly listed in his schedule, with the creditor's name and address, although the creditor does not in fact receive notice, or acquire actual knowledge, of the bankruptcy proceeding.[60] But as the law now stands, the discharge will not release the bankrupt from any debt which was omitted from his schedule, or which was so incorrectly set forth as not to be "duly" scheduled, unless it is shown that the creditor, notwithstanding the omission or error, had notice or actual knowledge of the bankruptcy proceedings in time to have proved his claim.[61] First, as to the total omission of a claim from the bankrupt's list of creditors, it appears that the courts will accept no excuses for such failure to list the claim. The discharge remains inoperative as against the omitted claim although the reason of its omission was that the bankrupt was ignorant of its existence at the time the schedule was made up,[62] or failed to remember it,[63] or omitted it at the request of the creditor himself,[64] or in pursuance of an understanding with the claimant's attorney, subsequently employed by the bankrupt himself.[65]

[59] In re Archenbrown, 11 N. B. R. 149, Fed. Cas. No. 504; Hoffman v. Haight, 3 Mackey (D. C.) 21; Hubbell v. Cramp, 11 Paige (N. Y.) 310; Pattison v. Wilbur, 10 R. I. 448, 12 N. B. R. 193; Lamb v. Brown, 12 N. B. R. 522, Fed. Cas. No. 8,011; Burpee v. Sparhawk, 108 Mass. 111, 4 N. B. R. 684, 11 Am. Rep. 320; Thurmond v. Andrews, 10 Bush (Ky.) 400; Heard v. Arnold, 56 Ga. 570, 15 N. B. R. 543.

[60] Travis v. Sams, 23 Ga. App. 713, 99 S. E. 239; Beck & Gregg Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242. But compare Dodgen v. McCrea (Tex. Civ. App.) 225 S. W. 71.

[61] In re Monroe (D. C.) 114 Fed. 398, 7 Am. Bankr. Rep. 706; Raley v. D. Sullivan & Co. (Tex. Civ. App.) 159 S. W. 99; Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App.) 182 S. W. 678; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776; Calmenson v. Moudry, 137 Minn. 123, 162 N. W. 1076; In re Rosenthal, 193 App. Div. 908, 183 N. Y. Supp. 697; Karter v. Fields, 140 Ala. 352, 37 South. 204; Hughes v. Clark, 109 Ill. App. 107; Reynolds v. Whittemore, 99 Me. 108, 58 Atl. 415; Tyrrel v. Hammerstein, 33 Misc. Rep. 505, 67 N. Y. Supp. 717; Lutz v. Kalmus, 115 N. Y. Supp. 230; Bernheim v. Bloch, 45 Misc. Rep. 581, 91 N. Y. Supp. 40; Kreitlein v. Ferger (Ind. App.) 97 N. E. 819; Gilmore v. Farmer, 156 Ill. App. 70; Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404.

[62] Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577.

[63] Jones v. Walter, 115 Ky. 556, 74 S. W. 249.

[64] Davis & Broadway v. L. S. Barwick & Son, 88 S. C. 355, 70 S. E. 1007.

[65] Webster City Steel Radiator Co. v. Chamberlin, 137 Iowa, 717, 115 N. W. 504.

But it is not sufficient that the creditor's name and claim appeared on the list; it must, in the language of the statute, be "duly scheduled." And to this end it is essential that the debt or claim should be so described as to identify it, or at least to put the creditor upon notice in regard to it.[66] Thus, if a mortgage was executed by the bankrupt and his wife together, it cannot be said to be duly scheduled when it is described as having been given by the wife alone.[67] But the operation of the discharge will not be defeated by the fact that an obligation represented by a note was scheduled as upon an open account.[68] And small variations in the bankrupt's own name, comparing that signed to the note or other evidence of the debt with that signed to the petition in bankruptcy, are not important in this connection.[69] But it is very different in regard to setting out the name of the creditor. This must be correctly stated, and a misnomer will be ground for holding that the debt was not "duly scheduled," even though the variance is comparatively unimportant and such as would ordinarily be cured on the rule of idem sonans.[70] But the Supreme Court of the United States, upon a full consideration of the question, has decided that the listing of a creditor by a mere initial instead of giving the Christian name (as, for instance, naming him simply as "C. Ferger") is not such an insufficient compliance with the requirements of the statute as to except that creditor's claim from the operation of the discharge.[71] Further, the bankrupt must correctly state the name of the person who is the holder of the claim at the time the schedule is made up, that is, if he has knowledge of its having changed hands. Thus, a note is not duly scheduled in the name of the payee, if the bankrupt knows at the time that it had been discounted by a bank.[72] Nor is a claim correctly listed in the name of the original creditor if the bankrupt knows that the creditor is dead

[66] But an inaccurate statement of the amount due, or of the date of a judgment, in the bankrupt's schedules, if not injurious or harmful to the creditor, will not take the debt out of the operation of the discharge. Claflin v. Wolff, 88 N. J. Law, 308, 96 Atl. 73.

[67] Fifth Ave. Bldg. & Loan Ass'n v. Goldberg, 22 Pa. Super. Ct. 197.

[68] Matteson v. Dewar, 146 Ill. App. 523.

[69] Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508; Finnell v. Armoura, 39 Utah, 316, 117 Pac. 49.

[70] Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449; Wright-Dalton-Bell-Anchor Store Co. v. Sanders, 142 Mo. App. 50, 125 S. W. 517; Cohen v. Pinkus, 126 App. Div. 792, 111 N. Y. Supp. 82; Haack v. Theise, 51 Misc. Rep. 3, 99 N. Y. Supp. 905; Liesum v. Kraus, 35 Misc. Rep. 376, 71 N. Y. Supp. 1022.

[71] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862. But see Collins v. Davidson, 34 Ohio Cir. Ct. R. 668, holding that a debt of a bankrupt due to William J. Davidson is not discharged by scheduling it in the name of William F. Davidson.

[72] Columbia Bank v. Birkett, 174 N. Y. 112, 66 N. E. 652, 102 Am. St. Rep. 478. But compare Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

and that the claim has been distributed among his heirs.[73] Where a claim has been assigned and the bankrupt has no knowledge of that fact, it is sufficient for him to list it in the name of the original creditor; but if he knows of the assignment he must use due diligence to discover and present the assignee's name and address in the schedule.[74] It seems also that the surviving partner of a firm creditor is correctly named as the creditor in the schedule,[75] and that if original creditors are named it is immaterial that their interests have been committed to a receiver,[76] and that, if a debt due to a bank is correctly listed in the name of the bank, the schedule is not vitiated by the fact that it does not mention the cashier of the bank, who is the nominal holder of the note by which the debt is secured.[77]

It is also essential to the due listing of a debt that the address of the creditor should be given if known to the bankrupt. It has been decided that a schedule listing the creditor's residence by the name of a city (as "Indianapolis" or "New York City") without giving the street and house number, is at least a prima facie compliance with the statute, and the defect is not sufficient, as a matter of law, to render the discharge of the bankrupt inoperative as to that creditor.[78] But if the bankrupt undertakes to give full particulars, the address required is that of the creditor's residence, and it is not proper to state his business or office address, if the residence address is known or can be ascertained. A mistake of this kind will prevent the discharge from releasing the particular debt.[79] A debt is not duly scheduled where the address given is that of a discontinued business, the bankrupt knowing that the business had been closed and that the creditor could not be reached at that address.[80] So, a debt is not released where the address of the creditor was given in the schedule as at a certain club, of which the creditor was a member but at which he did not reside.[81]

If the creditor's address is not known, it may be so stated in the schedule, and, in the absence of fraud, this will be a sufficient compliance with the statute to bring the debt within the operation of the dis-

[73] Fible v. Crabb, 129 Ky. 461, 112 S. W. 576.

[74] Lansing Liquidation Corp. v. Heinze, 184 App. Div. 129, 171 N. Y. Supp. 738; Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123; Mueller v. Goerlitz, 53 Misc. Rep. 53, 103 N. Y. Supp. 1037.

[75] Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. Supp. 729.

[76] Longfield v. Minnesota Sav. Bank, 95 Minn. 54, 103 N. W. 706.

[77] Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028.

[78] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862; Claflin v. Wolff, 88 N. J. Law, 308, 96 Atl. 73.

[79] McKee v. Preble, 154 App. Div. 156, 138 N. Y. Supp. 915; Weidenfeld v. Tillinghast, 54 Misc. Rep. 90, 104 N. Y. Supp. 712.

[80] Jenkins v. Levy (City Ct. N. Y.) 167 N. Y. Supp. 847.

[81] Horbach v. Arkell, 172 App. Div. 566, 158 N. Y. Supp. 842.

charge.[82] But it is a fraud to state the creditor's address as unknown, when in fact it is known to the bankrupt, and in this case the claim will not be affected by the discharge,[83] and the same result follows when the bankrupt inserts a certain street number as the residence of the creditor, when in fact he does not know where the creditor resides.[84] And a bankrupt is not permitted to state the creditor's residence as "unknown," and so bar the creditor's claim by his discharge, until he has made at least reasonably diligent efforts to discover it by proper inquiries.[85] For instance, if the name and address of the creditor are correctly given in the city directory, but are not stated in the bankrupt's schedule, the debt is not released.[86] So the debtor is not allowed to state the creditor's address as unknown when he could learn it from a draft drawn on him by the creditor which contained the latter's postoffice address,[87] or from a writ served upon him at the suit of the creditor.[88] But the bankrupt is justified in relying on information given to him by the creditor's attorney, as, where the attorney states that notice sent to a given address will reach the creditor,[89] or states that all communications in the matter should be addressed to the attorney's office.[90]

§ 728. Same; Creditor's Notice or Knowledge of Proceedings.—Under the explicit provisions of the bankruptcy act, the claim of a given creditor will be released by the discharge (being otherwise dischargeable) if the creditor had notice or actual knowledge of the bankruptcy proceedings, although his debt was altogether omitted from the bankrupt's schedule, or was incorrectly described therein, or the creditor's name or address was wrongly stated.[91] But the notice here intend-

[82] Steele v. Thalheimer, 74 Ark. 516, 86 S. W. 305; In re Mollner, 75 App. Div. 441, 78 N. Y. Supp. 281.

[83] Miller v. Guasti, 226 U. S. 170, 33 Sup. Ct. 49, 57 L. Ed. 173, 29 Am. Bankr. Rep. 201, affirming Guasti v. Miller, 203 N. Y. 259, 96 N. E. 416.

[84] Sutherland v. Lasher, 41 Misc. Rep. 249, 84 N. Y. Supp. 56.

[85] Feldmark v. Weinstein, 45 Misc. Rep. 329, 90 N. Y. Supp. 478; Schiller v. Weinstein, 47 Misc. Rep. 622, 94 N. Y. Supp. 763; In re Boom, 48 Misc. Rep. 632, 96 N. Y. Supp. 204; Cagliostro v. Indelli, 53 Misc. Rep. 44, 102 N. Y. Supp. 918; Hyde Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110; Popejoy v. Diedrich, 68 Colo. 383, 189 Pac. 841.

[86] In re Quackenbush, 122 App. Div. 456, 106 N. Y. Supp. 773; Murphy v. Blumenreich, 123 App. Div. 645, 108 N. Y. Supp. 175.

[87] Guasti v. Miller, 203 N. Y. 259, 96 N. E. 416.

[88] Parker v. Murphy, 215 Mass. 72, 102 N. E. 85.

[89] Vaughn v. Irwin, 49 Misc. Rep. 611, 96 N. Y. Supp. 742.

[90] In re David, 44 Misc. Rep. 516, 90 N. Y. Supp. 85.

[91] Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. Supp. 729; Morrison v. Vaughan, 119 App. Div. 184, 104 N. Y. Supp. 169; Thomson v. Caverley, 148 Ill. App. 295; Alling v. Straka, 118 Ill. App. 184; Zimmerman v. Ketchum, 66 Kan. 98, 71 Pac. 264; Fider v. Mannheim, 78 Minn. 309, 81 N. W. 2; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436; Perry Naval Stores Co. v. Caswell, 63 Fla. 552, 57 South. 660; Delta County Bank v. McGranahan, 37 Wash. 307, 79 Pac. 796; Briggs v. Angus, 52 Hun, 613, 5 N. Y. Supp. 313. Davis v. Findley,

ed is actual notice, and not such constructive notice as might be implied from the publication of the orders and proceedings in the bankruptcy case.[92] Actual notice or knowledge possessed by the creditor's authorized agent may be imputed to the creditor,[93] and the knowledge of a receiver may be imputed to the creditors whom he represents.[94] But an attorney employed to represent the creditor in an appeal from a judgment of a state court against the bankrupt, but not in any way employed in the bankruptcy proceedings, is not the creditor's agent in this sense or for this purpose.[95] And it is important to observe that an unscheduled debt cannot be brought within the operation of the discharge, on the ground that the creditor had actual notice of the proceedings, where his knowledge was not acquired until after the discharge had been granted, though he acquired it within the year allowed for proving claims and in time to have moved for the revocation of the discharge.[96] The question of notice or want of it is one to be tried when the discharge in bankruptcy is set up in defense to a suit by the creditor. When this is done, the creditor is entitled to show that he did not receive any notice, and had no actual knowledge of the bankruptcy proceedings.[97] And all facts, whether occurring before or after the commencement of the proceedings, tending to establish notice or the want of it, are competent evidence in determining the question.[98]

§ 729. **Debts Contracted in Fiduciary Capacity.**—By virtue of an express exception in the bankruptcy act, debts created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting in any fiduciary capacity are not released by his discharge.[99]

201 Ala. 515, 78 South. 869; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600.

[92] Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577. See Wheeler v. Newton, 168 App. Div. 782, 154 N. Y. Supp. 431. "Notice or actual knowledge" contemplates in every case actual personal notice of some sort to the creditor, as distinguished from mere imputed knowledge; hence constructive notice of bankruptcy proceedings is not sufficient to discharge an unscheduled debt. Lynch v. McKee (Tex. Civ. App.) 214 S. W. 484.

[93] Atkinson v. Elmore, 103 Mo. App. 403, 77 S. W. 492. A debt due to a bank, whose cashier had actual knowledge of the bankruptcy proceeding in time to have proved the debt, but failed to do so, is released by the discharge. Bank of Wrightsville v. Four Seasons, 21 Ga. App. 453, 94 S. E. 649.

[94] Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

[95] Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426. But see Keefauver v. Hevenor, 163 App. Div. 531, 148 N. Y. Supp. 434, holding that, where notice of bankruptcy proceedings was given to an attorney of a judgment creditor employed to collect the judgment, it was sufficient, though no notice was given to the creditor's attorney of record.

[96] Birkett v. Columbia Bank, 195 U. S. 345, 25 Sup. Ct. 38, 49 L. Ed. 231, 12 Am. Bankr. Rep. 691.

[97] Westheimer v. Howard, 47 Misc. Rep. 145, 93 N. Y. Supp. 518. Without any evidence of notice to the creditor, it cannot be presumed that he received it. Hilton v. White, 171 App. Div. 931, 156 N. Y. Supp. 9.

[98] Knapp v. Harold, 25 Ohio Cir. Ct. R. 213.

[99] Forbes v. Keyes, 193 Mass. 38, 78 N. E. 733; Treadwell v. Holloway, 46 Cal.

But it is held that the words "fiduciary capacity," as here used, are to be limited to cases of technical trusts expressly created, not merely such as the law implies from the contract or the relation of the parties, but actually and expressly constituted; and hence the phrase cannot be extended so as to apply to cases where the law regards the relation of the parties simply as that of debtor and creditor, though the nature of the transaction between them is such that more or less confidence is necessarily reposed in the debtor.[100] Thus the position of one who owes money, including accounts collected for the creditor, is not one of trust within the meaning of this clause of the statute.[101] Nor does a mere conversion of money or property put the bankrupt in the position of a fiduciary debtor.[102] And a contract consigning goods for sale, with a stipulation that the consignee will "hold in trust" for the consignor all goods remaining unsold and the proceeds of his sales, does not create a technical trust nor make the debtor a fiduciary in respect to the proceeds of sales.[103] Again, there is no fiduciary relation between a buyer and seller of merchandise, in respect to the unpaid price of the goods, although the sale was induced by the fraudulent representations of the buyer.[104] For similar reasons, this provision of the act is held not to apply to the liability of a subscriber for corporate stock for an amount due on his subscription.[105] And although a conveyance of property by the bankrupt was intended to delay and defraud his creditors, it does not follow that the grantee therein holds the property in a fiduciary capacity.[106]

The test of the dischargeability of the creditor's claim is the nature of the debt as originally created, or the original circumstances out of which it arose. And courts will look behind a note, a mortgage, or even a judgment, to ascertain the nature of the debt; and if it is discovered to

547; Herman v. Lynch, 26 Kan. 435, 40 Am. Rep. 320; Ruff v. Milner, 92 Mo. App. 620; Gerner v. Yates, 61 Neb. 100, 84 N. W. 596. An act of fraud, embezzlement, misappropriation, or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it while acting as an officer or in a fiduciary capacity. Martin v. Starrett, 97 Neb. 653, 151 N. W. 154.

[100] Lewis v. Shaw, 122 App. Div. 96, 106 N. Y. Supp. 1012; American Surety Co. v. Spice, 119 Md. 1, 85 Atl. 1031; Palmer v. Hussey, 87 N. Y. 303; Keime v. Graff, Fed. Cas. No. 7,650; Gibson v. Gorman, 44 N. J. Law, 325; Goddin v. Neal, 99 Ind. 334; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600.

[101] Hanan v. Long, 150 App. Div. 327, 134 N. Y. Supp. 786. The debt arising from the collection of wages after they have been assigned, by one not standing in a fiduciary capacity nor using false pretenses or representations to obtain the money, is not within the provision of the statute as to debts not discharged. Glasco v. Cooper, 17 Ga. App. 690, 87 S. E. 1095; Stovall v. Coker, 18 Ga. App. 126, 88 S. E. 907.

[102] Watertown Carriage Co. v. Hall, 66 App. Div. 84, 72 N. Y. Supp. 466.

[103] In re Butts, 120 Fed. 966, 10 Am. Bankr. Rep. 16.

[104] Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885.

[105] Morrison v. Savage, 56 Md. 143.

[106] Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332.

be one which is not released by a discharge in bankruptcy, it will be so adjudged.[107] For if the debt was created by the bankrupt while acting in a fiduciary capacity, it is immaterial that it has been reduced to judgment; the judgment will not be barred or affected by the discharge in bankruptcy any more than the original debt would be.[108] And a discharge in bankruptcy is no more a defense to a petition for a personal decree for a deficiency after mortgage sale, where the mortgage was given to secure the loan of trust funds misappropriated by the defendant, than it would be in a proceeding brought against him in his fiduciary capacity.[109] But in the case of a judgment, the courts will not go back of the record to inquire into the nature of the debt. Thus, if the record shows on its face that the judgment was obtained in a suit on a promissory note, it shows that there was no fiduciary relation between the parties, and the discharge in bankruptcy will be a good defense.[110] And it should be noticed that there may be a novation of the debt such as to extinguish its fiduciary character, as where a debt due from a guardian is formally released on his giving his individual note for the amount due.[111] Embezzlement is an act which can be committed only by a person who holds funds in a fiduciary character, so that an allegation that the defendant "wrongfully embezzled" the plaintiff's money necessarily implies that he became possessed of it in a fiduciary capacity, and therefore his answer setting up a discharge in bankruptcy as a defense is demurrable as insufficient.[112]

§ 730. Same; Trustees.—A trustee under an express trust (whether created by deed, will, or otherwise) acts in a fiduciary capacity, and his discharge in bankruptcy will not release him from liability for any claims against him on account of his loss, misappropriation, or conversion of the trust funds.[113] And the same rule applies to a trustee for creditors, and to a receiver,[114] and to an assignee under a deed of assignment for the benefit of creditors.[115] So a husband's liability as trustee under an antenuptial contract to account to the deceased wife's personal representative for trust moneys is a fiduciary debt.[116] And where a sum of money to which a wife was entitled, on the sale of certain land in par-

[107] Donald v. Kell, 111 Ind. 1, 11 N. E. 782.

[108] Wade v. Clark, 52 Iowa, 158, 2 N. W. 1039, 35 Am. Rep. 262; Brooks v. Yocum, 42 Mo. App. 516; Simpson v. Simpson, 80 N. C. 332. See Ford v. Blackshear Mfg. Co., 140 Ga. 670, 79 S. E. 576.

[109] Field v. Howry, 132 Mich. 687, 94 N. W. 213.

[110] Donald v. Kell, 111 Ind. 1, 11 N. E. 782.

[111] Coleman v. Davies, 45 Ga. 489.

[112] Watertown Carriage Co. v. Hall, 176 N. Y. 313, 68 N. E. 629.

[113] Warren v. Robinson, 21 Utah, 429, 61 Pac. 28; Crisfield v. State, 55 Md. 192.

[114] Field v. Howry, 132 Mich. 687, 94 N. W. 213.

[115] Pinkston v. Brewster, 14 Ala. 315.

[116] Donovan v. Haynie, 67 Ala. 51.

tition proceedings, was decreed to be paid to her husband, he to apply the interest to his own use and to give bonds for the payment of the principal sum at his death, or whenever so required by the court, it was held that the liability of the husband to pay over the principal sum was incurred in a fiduciary capacity.[117] The principle is further illustrated by a case in which one of two parties who contemplated the formation of a partnership paid over to the other a sum of money for the benefit of the firm, and shortly afterwards died. During his sickness, the recipient of the money deposited it in a bank in his own name, and after the death of his intended partner, he converted the money to his personal use. It was held that the partnership was dissolved by the death of one of the parties to it, and that the other thereafter became a trustee of the money for the benefit of the decedent's estate, so that his liability to account for it was contracted in a "fiduciary capacity" and was not released by his discharge in bankruptcy.[118] But here, as in other cases, it is necessary to apply the rule that the words of the statute, "acting in a fiduciary capacity," are meant to include only cases of technical trust, not implied trusts.[119] Hence the provision does not include the obligation of one to whom, as a creditor, the debtor has delivered property with directions to sell it, and apply so much of the proceeds as may be necessary to pay the debt, and pay over the balance to the debtor; the liability of the creditor to account for such balance involves no breach of trust, but only of contract.[120] And so, a debt arising out of an implied understanding had on a conveyance in the ordinary form of an absolute deed from A. to B. of certain parts of A.'s real estate, no trust being expressly declared, is not excepted from the operation of a discharge in bankruptcy.[121] In a case before the United States Supreme Court, which came much closer to the line, it appeared that A. directed B. to pay to the plaintiff $700 a year during her natural life, or during her good behavior, and to that end he delivered to B. the sum of $10,000, declaring that such annual payments should be considered as interest thereon, and he directed that, in certain contingencies, the principal sum should be paid to the plaintiff, but that, if the plaintiff died without issue, it should revert to A. and his heirs. The plaintiff and B. each executed a written acceptance of these directions. It was held that, although, in the instruments embodying it, the transaction was called a "trust" and B. a "trustee" for the plaintiff, yet the obligation

117 Mock v. Howell, 101 N. C. 443, 8 S. E. 167.

118 Haggerty v. Badkin, 72 N. J. Eq. 473, 66 Atl. 420.

119 Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73; Ehrhart v. Rork, 114 Ill. App. 509; Williamson v. Dickens, 5 Ired. (27 N. C.) 259.

120 Cronan v. Cotting, 104 Mass. 245, 4 N. B. R. 667, 6 Am. Rep. 232; Bissell v. Couchaine, 15 Ohio, 58.

121 Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332.

assumed by him was not a debt created in a fiduciary capacity, within the meaning of the bankruptcy law.[122]

§ 731. **Same; Executors, Administrators, and Guardians.**—An executor or administrator is a technical trustee, and holds the funds of the estate in a fiduciary capacity, and debts and liabilities growing out of his administration of the estate are not affected by his discharge in bankruptcy.[123] If he mingles the funds of the estate with his own money, he is guilty of a wrongful misappropriation thereof within the meaning of the bankruptcy law,[124] and so if he deposits the money in a bank in his own name and for his own benefit, and it is lost through the insolvency of the bank or through his own misconduct with respect to it.[125] And though part of the debt due from an executor or administrator may be made up of interest, it is none the less true that the whole debt is excepted from the operation of a discharge in bankruptcy, for the interest is a mere incident of the principal and cannot be separated from it.[126] A debt due from an executor to the residuary legatee is of the fiduciary character excepted from the operation of a discharge in bankruptcy.[127] But it is not only in his dealings with the beneficiaries that a personal representative acts in a fiduciary character. If he has so administered the estate as to render himself personally liable to creditors, his debt to them is also a fiduciary debt.[128] But an agreement by an executor guarantying the payment of a demand against the estate, and admitting the possession of sufficient assets, does not constitute a debt of this kind.[129] And where he settles with the distributees of the estate by giving them his personal notes, and they release him, there is a novation of the debts, and claims founded on the notes have no fiduciary character.[130] Again, where a party paid an executor for a portion of the assets of the estate which he purchased at a discount, but without any actual fraud, and was, with the executor, held liable for a devastavit, his subsequent discharge in bankruptcy was held a complete defense to an action against him for the devastavit.[131]

The liability of a guardian to his ward, with respect to the ward's property or money, is also a fiduciary debt, and not released by the guardian's discharge in bankruptcy.[132] And so, where a guardian makes

[122] Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

[123] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73.

[124] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73.

[125] Brown v. Hannagan, 210 Mass. 246, 96 N. E. 714; Morris v. Covey, 104 Ark. 226, 148 S. W. 257.

[126] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73.

[127] Crisfield v. State, 55 Md. 192.

[128] Laramore v. McKinzie, 60 Ga. 532.

[129] Amoskeag Mfg. Co. v. Barnes, 49 N. H. 312.

[130] Elliott v. Higgins, 83 N. C. 459; Light v. Merriam, 132 Mass. 283.

[131] Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586.

[132] In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; Simpson v. Simpson, 80

default, and his surety is forced to pay the deficit, the debt of the guardian to the surety for reimbursement is one contracted in a fiduciary capacity and is not affected by the former's discharge in bankruptcy.[133]

§ 732. **Same; Agents.**—Although an agent is "trusted" in the popular sense of the word, more or less confidence being necessarily reposed in his integrity and punctuality, this is not a case of express or technical trust so as to make his debt to his principal take on the character of a fiduciary debt.[134] Thus, an agent employed to collect rents due to his principal and remit the proceeds, does not act in the character of a trustee, and a debt created by his failure to account for money so collected is not excepted from the operation of his discharge in bankruptcy.[135] And generally this is true of any collecting agent employed to gather in periodical payments due from persons with whom his principal does business, or to collect a particular account, or generally or in specific instances to collect drafts, notes, and other bank items. There is no technical fraud in his mingling money so collected with his own funds, and if he misappropriates it or simply fails to account for it, it is not a breach of a technical trust, but only of a contract, and hence the claim against him is provable in bankruptcy and will be released by his discharge.[136] This is likewise true of an agent employed to sell and deliver goods of his principal (or simply to deliver goods sold) and collect and remit the proceeds, less his commission or other compensation; he is not a trustee nor does he act in a fiduciary capacity.[137] And a judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold and converted to his own use is not a fiduciary debt.[138] Again, an agent who retains money of his principal which was sent to him for a specific purpose, as, for instance, to take it to another

N. C. 332; Cromer v. Cromer, 29 Gratt. (Va.) 280.

133 Halliburton v. Carter, 55 Mo. 435, 10 N. B. R. 359.

134 Boyd v. Agriculture Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Young v. Clark, 7 Cal. App. 194, 93 Pac. 1056.

135 In re Benoit, 194 N. Y. 549, 87 N. E. 1115; Byrnes v. Byrnes, 129 N. Y. 23, 29 N. E. 244; Stull v. Beddeo, 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507.

136 Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621; Grover & Baker Sewing Machine Co. v. Clinton, 5 Biss. 324, 8 N. B. R. 312, Fed. Cas. No. 5,845; Green v. Chilton, 57 Miss. 598, 34 Am. Rep. 483; Guilfoyle v. Anderson, 9 Daly (N. Y.) 64; Kaufman v. Alexander, 53 Tex. 562; Hanan v. Long, 150 App. Div. 327, 134 N. Y. Supp. 786. But compare Fulton v. Hammond, 11 Fed. 291; Shipley v. Platts, 17 S. D. 357, 97 N. W. 1. And see Williams v. Virginia-Carolina Chemical Co. (Ala.) 62 South. 755. A bankrupt was held not released from a debt created by the collection of certain notes for defendant under an agreement reciting their receipt as trustee for collection. Williams v. Virginia-Carolina Chemical Co., 182 Ala. 413, 62 South. 755.

137 In re Camelo, 195 Fed. 632, 28 Am. Bankr. Rep. 353; In re Hale, 161 Fed. 387, 20 Am. Bankr. Rep. 633; American Agricultural Chemical Co. v. Berry, 110 Me. 528, 87 Atl. 218; Barber v. Sterling, 68 N. Y. 267.

138 In re Wenham, 153 Fed. 910, 16 Am. Bankr. Rep. 690.

place and there pay the note of the principal, cannot be treated as a defaulting trustee, but his liability will be discharged in bankruptcy.[139] This question not seldom arises in connection with the liability of one who is intrusted with the funds of another for the purpose of loaning them on real-estate security, and who is authorized to receive payment of the interest as due and of the principal of such loans, and directed to remit the same to his principal. When borrowers pay into his hands either the interest or the principal, it is held that he does not receive the money in the capacity of a trustee, and his failure to pay it over creates a simple debt which is dischargeable in bankruptcy.[140] But if, instead of investing the money sent to him, as directed, he converts it to his own use and employs it in his own business, it is considered that such a misapplication of the funds is a breach of trust, so that the debt thereby created will not be barred by his discharge in bankruptcy.[141] And the same result follows where he lends the principal's money to himself, or where, on lending it to a third person, he takes security in the form of a trust deed to himself as trustee. In the latter case, if the property or its proceeds come into his hands through foreclosure, he is technically a trustee and holds the property in a fiduciary capacity.[142] So also, an assignment of money to grow due in the future puts the assignor in the position of a trustee, so that if he collects the money when due and misappropriates it, he cannot plead his discharge in bankruptcy against the assignee's claim.[143]

§ 733. Same; Attorneys.—In several of the cases decided under former bankruptcy laws it was held that the relation of attorney and client is one of trust, and a violation of duty by the attorney is an act done in a fiduciary capacity under the bankruptcy law, and a debt growing out of the conversion or embezzlement by an attorney of his client's money or property, while in his hands, is a debt created while he is acting in a fiduciary capacity and therefore not released by his discharge in bankruptcy.[144] But the decisions to the contrary [145] appear to be sustained by the better reason, since the confidence which must necessarily be reposed in the integrity of an attorney at law, great as it is, is still not sufficient to make it a case of technical or express trust, to which cases alone the statute is intended to apply.[146]

139 Pankey v. Nolan, 6 Humph. (Tenn.) 154; Phillips v. Russell, 42 Me. 360. Compare Matteson v. Kellogg, 15 Ill. 547.

140 Bracken v. Milner, 104 Fed. 522, 5 Am. Bankr. Rep. 23.

141 Flagg v. Ely, 1 Edm. Sel. Cas. (N. Y.) 206.

142 Bracken v. Milner, 104 Fed. 522, 5 Am. Bankr. Rep. 23.

143 J. L. Mott Ironworks v. Toumey, 94 App. Div. 216, 87 N. Y. Supp. 1020.

144 Flanagan v. Pearson, 42 Tex. 1, 14 N. B. R. 37, 19 Am. Rep. 40; Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281.

145 Wolcott v. Hodge, 15 Gray (Mass.) 547, 77 Am. Dec. 381; Woodward v. Towne, 127 Mass. 41, 34 Am. Rep. 337.

146 Supra, § 729.

§ 734. **Same; Bailees.**—Unless expressly constituted a trustee, a bailee of personal property does not hold it in a fiduciary capacity, nor act in such a capacity when dealing with it, so that a debt or claim against him for the loss, destruction, or conversion of the property is simply founded on his breach of contract and will be released by his discharge in bankruptcy.[147] Thus, where one is intrusted with the effects of another to sell and dispose of them for the benefit of the latter, and to account to him therefor, the mere fact that such bailee has failed to account does not create a debt which is exempted from his discharge in bankruptcy.[148] So, where the bankrupts pledged accounts due them for merchandise sold to secure a loan, and also agreed to hold any goods returned by customers whose accounts were assigned as the property of the creditor or resell the same as his agents and account for the proceeds, it was held that a failure to pay over the proceeds of goods so resold did not create a liability for "willful and malicious injury" to the property of the creditor, nor a debt created by the bankrupts while acting in a fiduciary capacity.[149] And a claim against a pledgee of a certificate of stock, based on his pledging the stock for an amount in excess of the pledgor's indebtedness, shortly before his adjudication in bankruptcy, and a refusal to deliver the certificate to the pledgor on tender of payment of his debt, is predicated merely on the pledgee's breach of contract, and is a liability discharged in bankruptcy.[150] So again, where plaintiff sold personal property to defendant, under an agreement that the title should remain in the seller until the purchase price was paid, but defendant sold the property and appropriated the proceeds, it was held that his liability therefor was not created while he was acting in a fiduciary capacity.[151]

§ 735. **Same; Bankers and Brokers.**—A banker does not occupy the position of a trustee with respect to funds placed in his hands on general deposit. The relation of the parties is simply that of debtor and creditor. Hence a claim against the banker for the loss or conversion of the money will be a provable debt against him in bankruptcy and will be barred by his discharge.[152] So also, the dealings between a

147 Sumner v. Richie, 54 Iowa, 554, 6 N. W. 752; Phillips v. Russell, 42 Me. 360; Grannis v. Cubbedge, 71 Ga. 582. Compare Herman v. Lynch, 26 Kan. 435, 40 Am. Rep. 320. And see Burnham v. Noyes, 125 Mass. 85; Stokes v. Mason, 10 R. I. 261, 12 N. B. R. 498.

148 Georgia R. R. v. Cubbedge, 75 Ga. 321.

149 In re Toklas Bros., 201 Fed. 377, 29 Am. Bankr. Rep. 709.

150 Wood v. Fisk, 156 App. Div. 497, 141 N. Y. Supp. 342.

151 Bryant v. Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801.

152 Lewis v. Shaw, 122 App. Div. 96, 106 N. Y. Supp. 1012; Sheldon v. Clews, 13 Abb. New Cas. (N. Y.) 40; Shaw v. Vaughan, 52 Mich. 405, 18 N. W. 126; Maxwell v. Evans, 90 Ind. 596, 46 Am. Rep. 234; Hervey v. Devereux, 72 N. C. 463.

stockbroker and his customers are not of a fiduciary character, and the broker's discharge in bankruptcy will release him from claims against him growing out of his conversion or misappropriation of money placed in his hands by a customer as margin or for the purchase of stocks,[153] or his failure or refusal to return securities deposited with him as collateral,[154] or his unauthorized sale of stock purchased for a customer.[155]

§ 736. Same; Factors and Commission Merchants.—A factor or commission merchant is not technically a trustee with respect to the goods of his principal in his hands or with respect to the proceeds of sales, and his failure to pay over money due to his principal is not a breach of trust. It creates a simple debt, which is provable and dischargeable in bankruptcy, and not a fiduciary debt.[156] "If the act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the act." [157] But while this rule applies to debts due from a factor to his principal, it may be otherwise in respect to his liability for goods of the principal in his hands which he refuses to return on demand, having no legal excuse for such refusal. It has been held that this constitutes a debt created by his fraud or mis-

[153] In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Halpine v. May, 100 Mass. 498; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Clarke v. Milliken, 70 Misc. Rep. 492, 127 N. Y. Supp. 339.

[154] Palmer v. Hussey, 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 Atl. 328; Hennequin v. Clews, 77 N. Y. 427, 33 Am. Rep. 641.

[155] Stratford v. Jones, 97 N. Y. 586.

[156] Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; In re Adler, 152 Fed. 422, 81 C. C. A. 564, 18 Am. Bankr. Rep. 240; In re Gulick, 186 Fed. 350, 26 Am. Bankr. Rep. 362; Mathieu v. Goldberg, 156 Fed. 541, 19 Am. Bankr. Rep. 191; In re Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235; In re Benedict, 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Zeperink v. Card, 3 McCrary, 549, 11 Fed. 295; Owsley v. Cobin, 15 N. B. R. 489, Fed. Cas. No. 10,636; In re Smith, 9 Ben. 494, Fed. Cas. No. 12,976; Hayman v. Pond, 7 Metc. (Mass.) 328; Scott v. Porter, 93 Pa. St. 38, 39 Am. Rep. 719; Falkland v. Bank, 21 Hun (N. Y.) 450; Austill v. Crawford, 7 Ala. 335; Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711; Maxwell v. Evans, 90 Ind. 596, 46 Am. Rep. 234; Du Pont v. Beck, 81 Ind. 271; Grover & Baker S. M. Co. v. Clinton, 5 Biss. 324, 8 N. B. R. 312, Fed. Cas. No. 5,845; Keime v. Graff, 17 N. B. R. 319, Fed. Cas. No. 7,650; Kaufman v. Alexander, 53 Tex. 562; Butler-Kyser Mfg. Co. v. O. D. Mitchell & Co., 195 Ala. 240, 70 South. 665; New England Milk Producers' Ass'n v. Wing, 119 Me. 75, 109 Atl. 375; Keefauver v. Hevenor, 163 App. Div. 531, 148 N. Y. Supp. 434; Michelin Tire Co. v. Hearn (Tex. Civ. App.) 188 S. W. 943.

[157] Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236.

appropriation while acting in a fiduciary capacity, and one not dischargeable in bankruptcy.[158]

§ 737. **Same; Auctioneers.**—It has been held that an auctioneer acts in a fiduciary capacity in respect to goods placed in his hands for sale, and that his liability for their proceeds will therefore not be released by his discharge in bankruptcy.[159] But it is difficult to see what circumstance in his relation to the owner of the property, or in the nature of his employment, clothes an auctioneer with the character of a trustee, or distinguishes him, in this respect, from an ordinary bailee, factor, banker, broker, or attorney at law, all of whom, as shown in preceding sections, have been held not to act in a fiduciary capacity. And there is at least one decision of respectable authority to the effect that a deposit of money made by the purchaser at the sale is not received by the auctioneer in a fiduciary character.[160]

§ 738. **Same; Partners and Joint Adventurers.**—Although partners in business necessarily trust each other in a high degree, neither is a trustee for the other, in the technical sense, and hence a claim of one partner against the other for fraud or mismanagement of the partnership business, or for misappropriation of the firm's assets, is not a debt contracted while acting in a fiduciary capacity so as to be excepted from the operation of a discharge in bankruptcy.[161] And the same rule applies to joint adventures. Thus, where one receives money from another to be invested on their joint account in the purchase of land or commodities, with an agreement that it is to be returned if no investment is made, or that the profits of any successful purchase and sale shall be divided between them, no fiduciary debt is thereby created. Such an arrangement does not constitute the party receiving the money a trustee for the other, but merely a partner with him, and a debt growing out of the joint adventure will be dischargeable in bankruptcy.[162]

§ 739. **Same; Public and Other Officers.**—Among the debts expressly excepted from the operation of a discharge in bankruptcy are those created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer." And it is held that the words "while acting as an officer" qualify each of the four preceding nouns, and not merely the word "defalcation." In other words, a debt created

[158] Mathieu v. Goldberg, 156 Fed. 541, 19 Am. Bankr. Rep. 191.

[159] Jones v. Russell, 44 Ga. 460, 11 N. B. R. 478; In re Lord, 5 Law Rep. 258, Fed. Cas. No. 8,501; Crowther v. Elgood, L. R. 34 Ch. Div. 691.

[160] Gibson v. Gorman, 44 N. J. Law, 325.

[161] Gee v. Gee, 84 Minn. 384, 87 N. W. 1116; Karger v. Orth, 116 Minn. 124, 133 N. W. 471; Inge v. Stillwell, 88 Kan. 33, 127 Pac. 527, 42 L. R. A. (N. S.) 1003.

[162] Hill v. Shelbley, 68 Ga. 556; Pierce v. Shippee, 90 Ill. 371.

by the bankrupt's fraud while acting as an officer, or one created by his embezzlement while acting as an officer, or by his misappropriation of funds while acting as an officer, will be excepted from the operation of his discharge, in the same manner and to the same extent as a debt created by a technical "defalcation." [163] Among the public officers who are considered to be within this provision of the statute, so that money debts due from them in their official capacity are not affected by a discharge in bankruptcy, are collectors of taxes,[164] sheriffs, in so far as they receive or handle public money,[165] official auctioneers of cities,[166] any municipal officer whose duty requires him to collect and account for license fees,[167] and registers and receivers of the land offices.[168]

The bankruptcy acts of 1841 and 1867 both excepted from the operation of a discharge debts contracted in consequence of a defalcation as a "public officer." But the act of 1898, in this connection, omits the word "public" and employs the phrase "while acting as an officer." It is held that the change must be presumed to have been intentional, and that, by the omission of the word "public," Congress meant to bring officers of private corporations within the scope of its enactment.[169] Accordingly it is held that debts created in their official capacity by such officers as presidents and cashiers of banks, treasurers of other corporations, and generally all those who share in the management of the finances, are excepted from the operation of a discharge in bankruptcy.[170] But it has been ruled that where a defaulting public officer gives his note for the amount due (whether to his successor in office or to the officers authorized to demand the money in his hands), there is such a novation or change in the character of the debt that it loses its preferred character in bankruptcy, and becomes dischargeable like any ordinary claim founded on a note.[171]

[163] Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Harper, 133 Fed. 970. Under the act of 1867, which excepted from the effect of a discharge liabilities created by "defalcation" of a "public officer," it was held that the liability of a public officer merely for negligence in collecting and paying over claims placed in his hands for collection, was not within the terms of the statute. Courtney v. Beale, 84 Va. 692, 5 S. E. 708.

[164] Morse v. Lowell, 7 Metc. (Mass.) 152; Richmond v. Brown, 66 Me. 373; Town of Grantham v. Clark, 62 N. H. 426.

[165] Johnson v. Auditor, 78 Ky. 282; Councill v. Horton, 88 N. C. 222. See Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655.

[166] Jones v. Russell, 44 Ga. 460.

[167] In re Johnson, Fed. Cas. No. 7,365a.

[168] Ex parte Wright, Fed. Cas. No. 18,064.

[169] In re Harper, 133 Fed. 970, 13 Am. Bankr. Rep. 430, affirmed Harper v. Rankin, 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608.

[170] Harper v. Rankin, 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608; Bloemecke v. Applegate (C. C. A.) 271 Fed. 595; Boyd v. Applewhite, 121 Miss. 879, 84 South. 16; Floyd v. Layton, 172 N. C. 64, 89 S. E. 998; Shepard v. Morgan, 123 App. Div. 128, 108 N. Y. Supp. 379; Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216; Peterborough R. R. v. Wood, 61 N. H. 418.

[171] Wilkes County Com'rs v. Staley, 82 N. C. 395. But see, per contra,

§ 740. **Same; Sureties on Bonds of Fiduciary Debtors.**—The obligation of a surety on the bond of an executor, administrator, guardian, or other principal acting in a fiduciary capacity is simply contractual, and has none of the elements of a trust, and therefore if the surety become bankrupt, and his liability on the bond is so far fixed as to constitute a provable debt against his estate, it will be released by his discharge in bankruptcy.[172] Thus, the surety on the bond of a guardian "merely guarantees the acts of his principal. No trust or confidence is reposed in him. He has nothing to do with the person or property of the ward, and has no control over the conduct of the guardian. He is liable simply on his contract and according to its terms."[173] So it is held that a surety on an administrator's bond occupies no fiduciary relation that will prevent his discharge in bankruptcy from operating as a release from liability for contribution to his co-surety, who has been compelled to pay the debt of the administrator.[174] And on the same principle, if a surety gives his personal note for the debt due from his principal, and pays the note at maturity, his claim against the principal for reimbursement is not of such a fiduciary character as to be excepted from the operation of the principal's discharge in bankruptcy.[175]

§ 741. **Liabilities for Willful and Malicious Injuries.**—In its original form, the bankruptcy act of 1898 excepted from the operation of a discharge in bankruptcy "judgments for willful and malicious injuries to the person or property of another." But the amendment of 1903 substituted the word "liabilities" for the word "judgments." At present, therefore, it is not necessary that a liability for such injuries should have been reduced to judgment in order that it may escape the effect of the discharge.[176] But on the other hand, the change in terminology did not have the effect of removing judgments for such injuries from the category of excepted debts, but had the effect of including such liabilities whether reduced to judgment or not.[177] And where a defendant,

Madison Tp. v. Dunkle, 114 Ind. 262, 16 N. E. 593.

[172] Jones v. Knox, 46 Ala. 53, 7 Am. Rep. 583; Reitz v. People, 72 Ill. 435, 16 N. B. R. 196; McDonald v. State, 77 Ind. 26; Simpson v. Simpson, 80 N. C. 332; Davis v. McCurdy, 50 Wis. 569, 7 N. W. 665; Harmon v. McDonald, 187 Mass. 578, 73 N. E. 883, 3 Ann. Cas. 64; Fowler v. Kendall, 44 Me. 448; Saunders v. Commonwealth, 10 Gratt. (Va.) 494; McMinn v. Allen, 67 N. C. 131; Steele v. Graves, 68 Ala. 21; Ex parte Taylor, 1 Hughes, 617, 16 N. B. R. 40, Fed. Cas. No. 13,773.

[173] Reitz v. People, 72 Ill. 435, 16 N. B. R. 96.

[174] Miller v. Gillespie, 59 Mo. 220.

[175] Light v. Merriam, 132 Mass. 283; Cromer v. Cromer, 29 Gratt. (Va.) 280; Leinkauf v. Wellhouse, 1 Ga. App. 670, 57 S. E. 961.

[176] Bever v. Swecker, 138 Iowa, 721, 116 N. W. 704.

[177] Thompson v. Judy, 169 Fed. 553, 95 C. C. A. 51, 22 Am. Bankr. Rep. 154; Stefanini v. Sroka, 43 Misc. Rep. 614, 88 N. Y. Supp. 167; Woehrle v. Canclini, 158 Cal. 107, 109 Pac. 888; Barbery v. Cohen, 183 App. Div. 424, 170 N. Y. Supp. 762.

against whom a judgment has been obtained for an assault and who has been arrested on execution, makes application to take the poor debtor's oath, and gives a recognizance under the local statute, such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered on the recognizance is a liability for willful and malicious injury, and not released in bankruptcy.[178]

The courts have decided that the words "willful" and "malicious," as here used, do not connote malevolence in fact, or hatred or ill will. "Willful" means nothing more than intentional; and "malice" does not mean actual malice, but merely such a disregard of duty as is involved in the intentional doing of a willful act to the injury of another, or the doing of a wrongful act intentionally, without just cause or excuse.[179] This is illustrated by a case in which a judgment had been recovered, in an action of trespass vi et armis in a state court, against a schoolteacher for an assault upon a pupil alleged to have consisted in the infliction of corporal punishment with excessive severity. The district court held that this judgment was a dischargeable debt in bankruptcy, on the ground that the administration of corrective discipline by a teacher could not be regarded as "willful" or "malicious," in the absence of actual hatred or vindictiveness.[180] But this doctrine was reversed on appeal, the court holding as above stated, that the statute was satisfied with the intentional doing of a wrongful and injurious act without just cause or excuse.[181] On the same principle, it has been held that a judgment for personal injuries resulting from the sale to plaintiff of a quantity of pure carbolic acid, instead of a two per cent solution as asked for, is not dischargeable in bankruptcy.[182]

But here it is necessary to observe that negligence alone does not constitute either such malice or such willfulness as is contemplated by the act.[183] This rule was applied in a case where one built a fire in a street to burn leaves, and after he had left it, supposing it to be dead, the clothes of a child, who was throwing leaves on the fire, caught fire

[178] In re Colaluca, 133 Fed. 255, 13 Am. Bankr. Rep. 292.

[179] Peters v. United States, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206; McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769; Kavanaugh v. McIntyre, 128 App. Div. 722, 11 N. Y. Supp. 987; Wellman v. Mead, 93 Vt. 322, 107 Atl. 396.

[180] United States v. Peters, 166 Fed. 613, 22 Am. Bankr. Rep. 177.

[181] Peters v. United States, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206.

[182] In re Halper, 82 Misc. Rep. 205, 143 N. Y. Supp. 1005.

[183] Ex parte Harrison (D. C.) 272 Fed. 543, 47 Am. Bankr. Rep. 80; In re Madigan (D. C.) 254 Fed. 221, 41 Am. Bankr. Rep. 770; In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560; In re Wakefield (D. C.) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; Weisfield v. Beale, 44 Pa. Super. Ct. 386. But see Pearlman v. Booth, 160 App. Div. 219, 145 N. Y. Supp. 539.

and he was seriously burned, for which injury a judgment was recovered, against the enforcement of which the judgment debtor pleaded his discharge in bankruptcy. His conduct was of course negligent, but he had no intent to injure the child, and it was therefore held that the judgment was released by his discharge.[184] So again, in one of the cases it appeared that a person had been injured by the bite of a vicious dog. The animal belonged to a tenant and was kept on the leased premises, but the injured party sued the landlord and recovered judgment, the ground of the defendant's liability being that he was aware, from previous similar occurrences, of the dog's dangerous propensities. It was held that this judgment was released by the defendant's discharge in bankruptcy, since the ground of recovery against him was merely negligence and not willfullness or malice.[185] In another case, plaintiff recovered a judgment against an innkeeper for wrongfully causing the death of her husband. It appeared that the husband was at the inn while in a state of excited alcoholic intoxication, and defendant gave him chloral to quiet him and prevent his injuring himself or others. Death ensued, and the theory of plaintiff's action was that it was caused either by the administration of the drug or by defendant's negligence in failing to take proper care of the guest. It was held that the judgment could not, under either ground of recovery, be considered as one for a willful and malicious injury, and therefore it was released by a discharge in bankruptcy.[186]

Questions of this kind frequently arise in the case of street accidents, and particularly those caused by automobiles. The Supreme Court has said (though the remark was obiter dictum): "One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act; but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."[187] In accordance with this principle, it is generally held that a person who drives an automobile carelessly, recklessly, or negligently, and perhaps in violation of traffic rules or the municipal regulations applicable to such traffic, and thereby causes injury to the person or property of another, may be liable in damages for the tort, but that if there was no intent on his part to bring

[184] McClellan v. Schmidt (D. C.) 235 Fed. 986, 38 Am. Bankr. Rep. 104.

[185] In re Lorde (D. C.) 144 Fed. 320, 16 Am. Bankr. Rep. 201.

[186] Tompkins v. Williams, 137 App. Div. 521, 122 N. Y. Supp. 152. But a plea of discharge in bankruptcy was held good in an action to recover damages for negligent treatment by defendant as a dentist of plaintiff's teeth, under a contract of employment between the parties for such services. Boshes v. Kamin, 209 Ill. App. 508.

[187] Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, 11 Am. Bankr. Rep. 568.

about the accident, the claim for damages (or a judgment recovered thereon) will be released by his discharge in bankruptcy.[188] So it is said that a judgment for personal injuries caused by illegally driving an automobile while intoxicated is not one for willful and malicious injury to the person, since it does not involve an intent to cause the injury, and therefore such a judgment is barred by a discharge in bankruptcy.[189] But the distinction between negligence and wrongful intent is not always clear, and attention should be given to a case in the Supreme Court of Vermont, in which it was held that a discharge in bankruptcy was no bar to a judgment recovered in an action for causing death, as a result of defendant's running his motor car at an unlawful rate of speed and unlawfully attempting to pass the car in which the deceased was riding.[190]

On the other hand, a judgment for damages based on an assault and battery is for a willful and malicious injury and not released by the discharge in bankruptcy.[191] And so a judgment or a liability for damages for slander or libel is for such an injury to the person as is not released or affected by the discharge in bankruptcy.[192] And this is also true of a judgment in an action for false arrest or malicious prosecution,[193] and a judgment in forcible detainer against a landlord, based on his wrongfully and forcibly removing an assignee of the lease under a judgment for dispossession against the lessee alone.[194]

Further, since the exception in the statute applies not only to personal injuries, but also to willful and malicious injuries to "the property" of another, the courts have held that a fraudulent appropriation of the money or property of another is such an "injury" to it that the claim (or judgment) for damages will not be released by the discharge in bankruptcy.[195] In fact, it is broadly stated that one who disposes of

[188] In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560; In re Madigan (D. C.) 254 Fed. 221, 41 Am. Bankr. Rep. 770; In re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[189] In re Wilson (D. C.) 269 Fed. 845, 46 Am. Bankr. Rep. 477.

[190] Ex parte Cote, 93 Vt. 10, 106 Atl. 519.

[191] In re Conroy, 237 Fed. 817, 151 C. C. A. 59, 38 Am. Bankr. Rep. 208; Taylor v. Buser (Sup.) 167 N. Y. Supp. 887.

[192] In re Dowie, 202 Fed. 816, 29 Am. Bankr. Rep. 338; McDonald v. Brown, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659; National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131; Parker v. Brattan, 120 Md. 428, 87 Atl. 756; Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179, 3 Ann. Cas. 168; Drake v. Vernon, 26 S. D. 354, 128 N. W. 317. A judgment for damages for slander not being dischargeable in bankruptcy, a judgment against the plaintiff for costs in such an action partakes of the same character and is not released by the discharge. In re Dowie, 202 Fed. 816, 29 Am. Bankr. Rep. 338.

[193] Mason v. Perkins, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Taylor v. Marshall, 153 Ill. App. 409. But compare Johnston v. Bruckheimer, 133 App. Div. 649, 118 N. Y. Supp. 189.

[194] In re Munro, 195 Fed. 817, 197 Fed. 450, 28 Am. Bankr. Rep. 369.

[195] Hallagan v. Dowell (Iowa) 139 N. W. 883. A judgment against defendant for taking plaintiff's cattle without his

property without the owner's authority is guilty of a willful and malicious injury to property within the meaning of the Bankruptcy Act, so that his liability is not released by a discharge in bankruptcy.[196] Thus, where a stockbroker sells or hypothecates securities held by him as collateral, without the knowledge or consent of the owner, and appropriates the proceeds to his own use, it is a willful and malicious injury to property such as is not released by his discharge in bankruptcy.[197] This is also true of the unauthorized sale of mortgaged chattels by the mortgagee and payee of the note secured thereby, which was held by another as collateral, and the appropriation of the avails without the knowledge of the holder of the note,[198] and of the act of the mortgagor of chattels, holding permissive possession, in selling them at public sale and appropriating the proceeds.[199] A person who collects and uses salary or wages coming due to him after he has given an assignment thereof is likewise not released in bankruptcy from the resulting claim against him.[200] And it is said that a judgment in an action of replevin for the value of property obtained by the bankrupt by false representations that he was solvent and that his note was good for the property is not barred by his discharge.[201] But there is a decision that the liability of the maker of a note who converts to his own use the proceeds of a note deposited with the payee as collateral, does not arise from a willful and malicious injury to the property of the payee.[202]

§ 742. **Liabilities for Seduction and Criminal Conversation.**—Previous to the 1903 amendment to the bankruptcy act, there was some doubt as to whether the seduction of a woman or the wrong committed by criminal conversation or by the alienation of the affections of a husband or wife could be brought within the description of "willful and malicious injuries to the person or property of another"; though the courts generally inclined to the view that the terms quoted were broad enough to include injuries of the kind mentioned, and that judgments in such actions were not affected by a discharge in bankruptcy.[203] But this ques-

consent, and appropriating them to his own use, is not released by the defendant's discharge in bankruptcy. Vever v. Swecker, 138 Iowa, 721, 116 N. W. 704.

[196] Covington v. Rosenbusch, 22 Ga. App. 799, 97 S. E. 462.

[197] McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205, 38 Am. Bankr. Rep. 429, affirming Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135; Wood v. Fiske, 175 App. Div. 135, 161 N. Y. Supp. 1097 (see this case on appeal, 215 N. Y. 233, 109 N. E. 177); Heaphy v. Kerr, 190 App. Div. 810, 180 N. Y. Supp. 542; Delve v. Devere (Sup.) 164 N. Y. Supp. 608.

[198] Sabinal Nat. Bank v. Bryant (Tex. Com. App.) 221 S. W. 940.

[199] Mason v. Sault, 93 Vt. 412, 108 Atl. 207.

[200] Covington v. Rosenbusch, 148 Ga. 459, 97 S. E. 78.

[201] In re Kalk (D. C.) 270 Fed. 627, 46 Am. Bankr. Rep. 597.

[202] First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600.

[203] Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, 11 Am.

tion was set at rest by the amendment referred to, which explicitly includes among the debts which are not released by a discharge "liabilities for seduction of an unmarried female or for criminal conversation."[204] But a judgment rendered against a bankrupt in an action for breach of promise of marriage, where there is no proof of seduction of the plaintiff, or of malice or any injury to character, is for a mere contract debt, and comes within the operation of his discharge,[205] and so, perhaps, where seduction is shown as an element of damages, but not made a substantive part of the cause of action.[206] Yet it has been ruled that a judgment obtained by an unmarried woman for breach of marriage promise, accompanied by seduction, will be regarded as entirely for the seduction, and therefore not dischargeable in bankruptcy, in the absence of a showing as to what part of the damages was awarded for the breach of promise.[207]

§ 743. Debts Contracted by Fraud.—In the present bankruptcy act, as originally enacted, the classes of debts excepted from the operation of a discharge included "judgments in actions for frauds." Under the act of 1867, the exception had applied to "debts created by fraud." And in consequence of the change of language, it was held that a claim created by the fraud of the bankrupt was not now an excepted debt unless reduced to judgment.[208] But the revision of this section of the bankruptcy act by the amendment of 1903 omits the phrase "judgments in actions for frauds," and, indeed, contains no reference whatever to fraud, except in the sentence which provides that a discharge shall not release the bankrupt from debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." At first sight this would appear to include all debts "created by fraud," but the Supreme Court held that the words "while acting as an officer or in any fiduciary capacity" qualified all four of the nouns preceding, so that debts created by the fraud of the bankrupt were held not excepted from the discharge unless so created while he was acting as an officer or in a fiduciary capacity.[209] But the reason for this con-

Bankr. Rep. 568; Colwell v. Tinker, 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, 98 Am. St. Rep. 587; Leicester v. Hoadley, 66 Kan. 172, 71 Pac. 318, 65 L. R. A. 523; In re Freche, 109 Fed. 620, 6 Am. Bankr. Rep. 479; In re Maples, 105 Fed. 919, 5 Am. Bankr. Rep. 426; Exline v. Sargent, 23 Ohio Cir. Ct. R. 180. Compare In re Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580; In re Sullivan, 1 Nat. Bankr. News, 380; Howland v. Carson, 28 Ohio St. 625, 16 N. B. R. 372.

[204] In re Grounds (D. C.) 215 Fed. 280.

[205] Finnegan v. Hall, 35 Misc. Rep. 773, 72 N. Y. Supp. 347; Bond v. Milliken, 134 Iowa, 447, 109 N. W. 774, 120 Am. St. Rep. 440; In re Komar (D. C.) 234 Fed. 378, 37 Am. Bankr. Rep. 683.

[206] Disler v. McCauley, 66 App. Div. 42, 73 N. Y. Supp. 270.

[207] In re Warth, 200 Fed. 408, 118 C. C. A. 560, 29 Am. Bankr. Rep. 210.

[208] Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; Lippincott, Johnson & Co. v. Herman, 179 Mo. 350, 78 S. W. 1132.

[209] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am.

struction was that, to include all debts fraudulently contracted would render meaningless the exception in the previous sentence in favor of such claims for fraud as had been reduced to judgment. And since Congress, in amending the section has omitted all mention of judgments on claims founded on frauds, this argument has lost its weight. Indeed, the significant omission of this phrase might support an argument that it was the intention of Congress to remove the limitation which required such claims to be reduced to judgment, and to provide, instead, that all claims "created by the fraud" of the bankrupt should be excepted from the discharge. And it is so held in some of the cases.[210]

Whether the more extended or the more restricted meaning be taken as correct, it is important to notice that a debt created through the fraud of the bankrupt is none the less excepted from the benefit of his discharge because it has been reduced to judgment. In other words, a cause of action does not become merged in a judgment thereon so as to preclude the creditor from showing that the original debt was created by fraud, and if it is established that the original debt would not have been dischargeable in bankruptcy, neither will the judgment recovered upon it be so dischargeable.[211] This fact need not appear on the face of the judgment, but it is proper to look behind it and examine the entire record in order to ascertain the character of the debt on which it was founded,[212] and if it thus appears that fraud was the gravamen or gist of the action, the judgment will be held not affected by the discharge.[213] But

Bankr. Rep. 659; Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, 13 Am. Bankr. Rep. 108; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Gee v. Gee, 84 Minn. 384, 87 N. W. 1116; J. C. Smith & Wallace Co. v. Lambert, 69 N. J. Law, 487, 55 Atl. 88; Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 Atl. 328; Morse v. Kaufman, 100 Va. 218, 40 S. E. 916; Jewett Bros. & Jewett v. Bentson, 20 S. D. 175, 105 N. W. 173; Dilley v. Simmons Nat. Bank (Ark.) 158 S. W. 144.

[210] In re Butts, 120 Fed. 966; Frey v. Torrey, 175 N. Y. 501, 67 N. E. 1082.

[211] Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55, affirmed 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807; Gee v. Gee, 84 Minn. 384, 87 N. W. 1116; Packer v. Whittier, 91 Fed. 511, 33 C. C. A. 658, 1 Am. Bankr. Rep. 621; In re Pettis, Fed. Cas. No. 11,046; Warner v. Cronkhite, 6 Biss. 453, Fed. Cas. No. 17,180; Horner v. Spelman, 78 Ill. 206; Freiberg v. Popper, 12 Hun (N. Y.) 658; Kaufman v. Lindner, 67 How. Prac. (N. Y.) 322; Young v. Grau, 14 R I. 340; In re Patterson, 2 Ben. 155, 1 N. B. R. 307, Fed. Cas. No. 10,817. Contra, see Shuman v. Strauss, 34 N. Y. Super. Ct. 6; Kames v. Fox, 14 Phila. (Pa.) 208; Palmer v. Preston, 45 Vt. 154, 12 Am. Rep. 191; Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120.

[212] Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; In re Bullis, 171 N. Y. 689, 64 N. E. 1119; Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Moody v. Muscogee Mfg. Co., 134 Ga. 721, 68 S. E. 604, 20 Ann. Cas. 301; Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411. A judgment in favor of plaintiff in an action for deceit is conclusive that the debt was the result of fraud and not discharged in bankruptcy. In re Shepardson (D. C.) 220 Fed. 186, 34 Am. Bankr. Rep. 284.

[213] Oberreich v. Foster, 148 Ill. App. 397; In re Benoit, 124 App. Div. 142, 108 N. Y. Supp. 889; In re Blumberg, 94 Fed 476, 1 Am. Bankr. Rep. 633; Collins v.

on the other hand, the record is conclusive, and if it contains nothing to show the alleged fraudulent character of the claim sued on, it will not be sufficient to repel the plea of a discharge in bankruptcy.[214] And where a plaintiff sued for money had and received and also on an indebtedness alleged to have been created by the bankrupt's embezzlement of trust funds, and the verdict was general, and there was nothing to show that it included the latter indebtedness alone, there is no ground for holding the judgment to be excepted from the operation of the discharge in bankruptcy.[215] Further, if a plaintiff sues on a promissory note, an account stated, a written contract, a bond, or the like, it is an election to waive any fraud which induced or entered into the creation of the indebtedness, and such fraud cannot be brought up again and insisted on for the purpose of withdrawing the judgment from the effect of defendant's discharge in bankruptcy.[216]

In this connection, the word "fraud" means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.[217] And a legal fraud can be committed only by fraudulent representations of fact or by such conduct or artifice for a fraudulent purpose as will throw one off his guard and cause him to omit inquiry or examination which he would otherwise make.[218] Where a purchaser receives goods knowing himself to be insolvent, and with the intention of disposing of them without paying the price, this constitutes such fraud as will take the case out of the operation of his discharge in

McWalters, 35 Misc. Rep. 648, 72 N. Y. Supp. 203.

[214] Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493, 51 Atl. 454; Barnes Cycle Co. v. Haines, 69 N. J. Eq. 651, 61 Atl. 515; Quaker City Watch Co. v. Lamoreaux, 21 Pa. Super. Ct. 493.

[215] Cooke v. Plaisted, 181 Mass. 82, 62 N. E. 1054.

[216] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 633; Mulock v. Byrnes, 59 Hun, 623, 13 N. Y. Supp. 190; Palmer v. Preston, 45 Vt. 154, 12 Am. Rep. 191; Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; Gregory v. Williams, 106 Kan. 319, 189 Pac. 932. Contra, Stewart v. Emerson, 52 N. H. 301, 8 N. B. R. 462.

[217] Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, 13 Am. Bankr. Rep. 108; Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586; Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1033, 29 L. Ed. 248; Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621; Western Union Cold Storage Co. v. Hurd, 116 Fed. 442, 8 Am. Bankr. Rep. 633; In re Shepardson (D. C.) 220 Fed. 186, 34 Am. Bankr. Rep. 284; Sanger Bros. v. Barrett (Tex. Civ. App.) 221 S. W. 1087; Lund v. Bull, 76 N. H. 132, 80 Atl. 141, Ann. Cas. 1912B, 819; Ely v. Curtis, 60 N. H. 513; Hennequin v. Clews, 77 N. Y. 427, 33 Am. Rep. 641; Louisville & N. R. Co. v. Bryant, 149 Ky. 359, 149 S. W. 830; Cooper Grocery Co. v. Gaddy (Tex. Civ. App.) 141 S. W. 825; Brenner v. Duard, 126 Mass. 400; Curtis v. Waring, 92 Pa. St. 104; Allen v. Hickling, 11 Ill. App. 549; Rowe v. Guilleaume, 18 Hun (N. Y.) 556. Compare Jones' Ex'rs v. Clark, 25 Gratt. (Va.) 642.

[218] In re Nuttall, 201 Fed. 557, 29 Am. Bankr. Rep. 800.

bankruptcy.[219] So a discharge will not release a bankrupt who was a public warehouseman from a claim or judgment arising by reason of his fraudulently removing property from his warehouse contrary to the provisions of a state statute,[220] nor can a discharge be set up by one who, after the sale of property and delivery of warehouse receipts for it, sells the same property to another,[221] nor by a debtor who, at the time of contracting the debt, pledges as security for it collateral which he knows to be worthless.[222] And it has been held that one who accepts a transfer of another's property, knowing that it is made for the purpose of defrauding the latter's creditors, is himself guilty of such actual fraud that a claim or judgment against him for the restoration of the property is not barred by his discharge.[223] But on the other hand, where plaintiff undertook to guaranty defendant's honesty in his capacity as an insurance agent, the liability of defendant to indemnify plaintiff for the amount plaintiff was compelled to pay under such guaranty is not a debt created by fraud in this sense.[224] And so of a transaction by which one induced another to dismiss an action on a note by representing that he would pay it if not molested, and thereafter went into bankruptcy.[225] And further, a debt, to be fraudulent within the meaning of the bankruptcy law, must be tainted with fraud in its inception. If the contract was fair and honest when made, although the debtor may subsequently be guilty of fraudulent conduct in respect to it, yet such conduct will not destroy the benefit of his discharge in bankruptcy.[226]

§ 744. **Same; Deceit and False Representations.**—In the bankruptcy act, as it stood originally, there was an exception from the operation of a discharge as to "judgments in actions for frauds, or obtaining property by false pretenses or false representations." This was amended in 1903, so as to except "liabilities for obtaining property by false pretenses or false representations."[227] But the purpose of the amendment

[219] Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; Strauss v. Abrahams, 32 Fed. 310; Classen v Schoenemann, 80 Ill. 304, 16 N. B. R. 98; Ames v. Moir, 130 Ill. 582, 22 N. E. 535.

[220] Halsey v. Jordan, 155 Ill. App. 144.

[221] Taylor v. Farmer, 81 Ky. 458.

[222] Bank of North America v. Crandall, 87 Mo. 208.

[223] Mackel v. Rochester, 135 Fed. 904, 14 Am. Bankr. Rep. 429.

[224] American Surety Co. v. Spice, 119 Md. 1, 85 Atl. 1031.

[225] Jenkins v. Pilcher, 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423.

[226] Brown v. Broach, 52 Miss. 536, 16 N. B. R. 206.

[227] Bankruptcy Act 1898, § 17a, as amended by Act Congress Feb. 5, 1903, 32 Stat. 797. And see Nelson v. Petterson, 131 Ill. App. 443; Atlanta Skirt Mfg. Co. v. Jacobs, 8 Ga. App. 299, 68 S. E. 1077; Lee v. Tarplin, 194 Mass. 47, 79 N. E. 786; Morse v. Hutchins, 102 Mass. 439; In re Menzin, 238 Fed. 773, 151 C. C. A. 623, 38 Am. Bankr. Rep. 435; M. C. Kiser Co. v. Gerald, 17 Ala. App. 648, 88 South. 49; Brandt v. Klement, 20 Ga. App. 664, 93 S. E. 255; J. K. Orr Shoe Co. v. Upshaw & Powledge, 13 Ga. App. 501, 79 S. E. 362. Though fraud practised by other means than false representations may be actionable, it is only fraud by obtaining property by false pretenses or false representations

was not to remove liabilities evidenced by judgments from the excepted classes, but rather to add thereto liabilities so arising which had not been put into the form of judgments.[228] Hence a claim against the bankrupt for obtaining property by false representations is not merged in the judgment recovered upon it in such sense as to bring the judgment within the operation of the discharge where the claim would not be.[229] But if the creditor, having parted with his property in reliance on false pretenses or representations, accepts a note for the amount due, no fraud being practiced upon him to induce his acceptance of the note, neither the note nor a judgment recovered upon it will be excepted from the defendant's discharge.[230] And this provision of the statute does not embrace a case where the bankrupt obtained the property in question as a loan in the first instance, though he afterwards converted it.[231] So, where the bankrupt had already obtained goods from the plaintiff, his act in inducing the plaintiff to accept a note for the price by means of false representations is not an "obtaining of property."[232] Again, a representation made in good faith, though it does not actually correspond with the facts, or a warranty given on the sale of a chattel, is not a "false pretense" or a "false representation" within the meaning of this section.[233] And so, where the defendant, when he executed a note to the plaintiff, prior to being adjudged a bankrupt, represented that he owned an interest in a store, which was true at the time, the fact that a month or so afterwards he sold his interest without notice to the plaintiff did not amount to fraud so as to enable the plaintiff to recover on the note notwithstanding the defendant's discharge in bankruptcy, for the representation was not a continuing one.[234]

As to the character of the pretenses or representations intended by the statute, it may be said that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money or property from another, and by means of which such money or property

which prevents the release of a bankrupt from his provable debts. Zimmern v. Blount, 238 Fed. 740, 151 C. C. A. 590.

[228] Woehrle v. Canclini, 158 Cal. 107, 109 Pac. 888.

[229] Dilley v. Simmons Nat. Bank, 108 Ark. 342, 158 S. W. 144; Hyland v. Fink (Sup.) 178 N. Y. Supp. 114; Chambers v. Kirk, 41 Okl. 696, 139 Pac. 986; In re Lewensohn (D. C.) 99 Fed. 73, 3 Am. Bankr. Rep. 594; Nichols v. Doak, 48 Wash. 457, 93 Pac. 919, 125 Am. St. Rep. 942; In re Lewensohn, 104 Fed. 1006, 44 C. C. A. 309. The record of the judgment is conclusive of its character as a claim for this purpose. Morrow v. Pfleiderer, 4 Ohio App. 283.

[230] In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; Blackman v. McAdams, 131 Mo. App. 408, 111 S. W. 599.

[231] Maxwell v. Martin, 130 App. Div. 80, 114 N. Y. Supp. 349. Where money was advanced to the bankrupt for an interest in a land speculation, which remained uncompleted because the bankrupt never acquired title to the land, the liability to refund is not one for obtaining property by false representations. Bowman v. Provident Realty Inv. Co., 40 Cal. App. 115, 180 Pac. 18.

[232] Carville v. Lane, 116 Me. 332, 101 Atl. 968.

[233] Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918.

[234] Gregory v. Pierce, 186 Iowa, 151, 172 N. W. 288.

is so obtained, is a legal fraud and within the statute.[235] By far the most common form of such fraud is that practised by an intending buyer of property who procures the sale and delivery of it to him without payment by means of false statements as to the nature and extent of his financial resources or as to his ownership of particular property. This is always held to be within the statute.[236] So also is the case where the purchaser falsely represents that he is that day to receive a check for a certain amount and that he will at once turn it over to the creditor,[237] or where he lies as to the value, situation, or condition of property which he really owns, as, by stating that it is free from incumbrances, that it is covered with valuable timber, or the like,[238] or where he undertakes to turn over to the seller, as part of the consideration, a note of a third person, knowing at the time that the note is in the hands of an assignee, from whom he cannot procure it,[239] or where he fraudulently causes the owner of property to believe that he intends to pay for it (having no such intention) or fraudulently conceals his intention not to pay,[240] or where he obtains goods on credit with the intention of setting over the goods to certain other favored persons, leaving himself nothing with which he could pay for them.[241] But inducing a creditor to surrender a note by promising immediately to take the benefit of the bankruptcy law and thereafter to pay the amount of it in full has been held not such a "false representation" as the statute contemplates.[242]

Money is property, and a liability for obtaining money by false representations is not dischargeable in bankruptcy.[243] And this is also true of a liability incurred by obtaining another surety for the bankrupt by his false representations.[244] But the services and advice of an attorney at law are not "property," and though they were procured by

[235] Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807.

[236] Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807; Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55; Talcott v. Friend, 179 Fed. 676, 103 C. C. A. 80, 24 Am. Bankr. Rep. 708; In re Taff & Conyers, 182 Fed. 899, 25 Am. Bankr. Rep. 600; In re Alsberg, 16 N. B. R. 116, Fed. Cas. No. 261; Broadnax v. Bradford, 50 Ala. 270; Turner v. Atwood, 124 Mass. 411. In re Groodzinsky (D. C.) 248 Fed. 753, 40 Am. Bankr. Rep. 861; Ehlinger v. Speckels (Tex. Civ. App.) 189 S. W. 348; In re Dunfee, 219 N. Y. 188, 114 N. E. 52; E. I. Du Pont De Nemours Powder Co. v. Schwenger, 90 Misc. Rep. 678, 154 N. Y. Supp. 186. Contra, see Roth v. Pechin, 260 Pa. 450, 103 Atl. 894.

[237] Rowell v. Ricker, 79 Vt. 552, 66 Atl. 569.

[238] In re Bullis, 171 N. Y. 689, 64 N. E. 1119; Peel v. Bryson, 72 Ga. 331; Kennett v. Tudor, 91 Vt. 70, 99 Atl. 306.

[239] Forbes v. Thomas, 22 Neb. 541, 35 N. W. 411.

[240] Stewart v. Emerson, 52 N. H. 301, 8 N. B. R. 462; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776.

[241] Louisville Dry Goods Co. v. Lanman, 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451.

[242] Landgraf v. Griffith, 41 Ind. App. 372, 83 S. E. 1021.

[243] Hallagan v. Dowell (Iowa) 139 N. W. 883.

[244] Gaddy v. Witt (Tex. Civ. App.) 142 S. W. 926.

the client by false pretenses, yet the attorney's claim for a fee is barred by the client's discharge in bankruptcy.[245] It is not necessary that the false pretenses or representations should have been made in writing,[246] and a false representation by one partner, by means of which property was obtained by the firm, will be imputed to the other partners to the extent of holding them civilly liable for the debt.[247] But it is necessary that the creditor should have been induced actually to part with property or rights in reliance upon the representations made to him,[248] and that he should not have actual knowledge or notice of their falsity.[249]

§ 745. **Same; Conversion of Property.**—It was at one time quite generally held that a judgment recovered in an action for the conversion of money or of property, or of the proceeds of its sale, was not a judgment for fraud nor for false pretenses nor for willful and malicious injuries, and therefore was not excepted from the operation of a discharge in bankruptcy.[250] And as for a claim for damages for such a conversion, it was thought that if it was not contingent but fixed, and not unliquidated but certain, it was a provable debt in bankruptcy and therefore released by the bankrupt's discharge.[251] If, however, it was not of a character to be provable in bankruptcy, it was considered to be unaffected by the discharge, not on account of its falling within any of the excepted classes of claims, but because the law limits the effect of a discharge to the "provable debts" of the bankrupt.[252] This may of course be the case where, although the circumstances exist making a conversion possible, no conversion actually takes place until after the adjudication in bankruptcy.[253] It was thought, however, that a conversion of property might well be committed in such circumstances as to make it grossly unjust that the bankrupt should escape the consequences of his act by the medium of his discharge, as, for instance, where the

[245] Gleason v. Thaw, 236 U. S. 558, 35 Sup. Ct. 287, 59 L. Ed. 717, 34 Am. Bankr. Rep. 177; In re Thaw, 180 Fed. 419, 24 Am. Bankr. Rep. 759; Gleason v. Thaw, 185 Fed. 345, 196 Fed. 359, 25 Am. Bankr. Rep. 782.

[246] Katzenstein v. Reid, Murdock & Co., 41 Tex. Civ. App. 106, 91 S. W. 360.

[247] Frank v. Michigan Paper Co., 179 Fed. 776, 103 C. C. A. 268, 24 Am. Bankr. Rep. 261.

[248] Rudstrom v. Sheridan, 122 Minn. 262, 142 N. W. 313.

[249] Hoskins v. Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

[250] In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Fechter v. Postel, 114 App. Div. 776, 100 N. Y. Supp. 207; Burnham v. Pidcock, 33 Misc. Rep. 65, 66 N. Y. Supp. 806; Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 Atl. 328; Ex parte Peterson, 77 Vt. 226, 59 Atl. 828; State v. Beck, 175 Ind. 664, 93 N. E. 664.

[251] Sabinal Nat. Bank v. Bryant (Tex. Civ. App.) 191 S. W. 1179; Lilly v. Barron, 144 Ark. 422, 222 S. W. 712; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600; Mason v. Sault, 93 Vt. 412, 108 Atl. 267.

[252] Watertown Carriage Co. v. Hall, 75 App. Div. 201, 77 N. Y. Supp. 1028, affirmed, 176 N. Y. 313, 68 N. E. 629. And see supra, § 514.

[253] Creamery Package Mfg. Co. v. Horton, 178 App. Div. 467, 165 N. Y. Supp. 257.

conversion was larcenous or practically a theft.[254] And in 1916, the Supreme Court of the United States decided that the unauthorized sale by a broker of certificates of stock held by him as collateral, and the appropriation of the avails to his own use, without the knowledge of the owner, is a "willful and malicious injury to property" and therefore the liability of the broker is not released by his discharge in bankruptcy.[255] Since then, the other courts have agreed that a discharge in bankruptcy cannot be set up as a bar to claims for damages arising out of similar instances of the conversion of money or property or the wrongful appropriation of the proceeds of property.[256]

§ 746. **Effect of Proving Debt and Receiving Dividends.**—A creditor who holds a claim against the bankrupt of such a character that it will not be released by the bankrupt's discharge, being within one of the classes of debts expressly excepted by the statute, and who proves his claim in the bankruptcy proceedings, does not thereby change the relation of the parties into the ordinary relation of debtor and creditor so as to make the claim dischargeable,[257] except, of course, in cases where he chooses to waive any tort involved in the transaction and prove his claim as upon a contract or an open account.[258] The exemptions or exceptions from the operation of a discharge specified in the statute do not rest upon any theory of the exclusion of the creditor from the bankruptcy act, or of deprivation of the right to participate in the distribution of the estate, but solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is superadded.[259] A creditor holding a non-dischargeable debt may therefore participate like any other creditor in the proceedings, and prove his debt and receive his dividends on it. But the nature of his claim does not give him any preference over other creditors. He is not in a position like that of a lien creditor or one entitled to priority. He has no exclusive or superior advantages in the assets over the other creditors.[260] But his rights differ from those of creditors with dischargeable debts in this, that, after the bankrupt's discharge, such a creditor may continue to prosecute a pending action against him or institute a new suit, or proceed

[254] In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459; In re Arnao (D. C.) 210 Fed. 395, 32 Am. Bankr. Rep. 88; Young v. City Nat. Bank (Tex. Civ. App.) 223 S. W. 340.

[255] McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205, 38 Am. Bankr. Rep. 165.

[256] Baker v. Bryant Fertilizer Co. (C. C. A.) 271 Fed. 473, 46 Am. Bankr. Rep. 579; In re Keeler (D. C.) 243 Fed. 770, 40 Am. Bankr. Rep. 231; Raymond v. Cohen (N. H.) 112 Atl. 909.

[257] Brown v. Hannagan, 210 Mass. 246, 96 N. E. 714.

[258] Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Nuttall, 201 Fed. 557, 29 Am. Bankr. Rep. 800.

[259] Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, 30 Am. Bankr. Rep. 31.

[260] Winters v. Claitor, 54 Miss. 349.

in any legitimate way to enforce the unsatisfied balance of his claim against the bankrupt or against his after-acquired property, as if no discharge had been granted. His having proved his claim and received dividends on it does not in any way estop him from taking this course, and dividends received are to be treated merely as partial payments.[261] But of course he must account or give credit for the amount of any dividends received, and also, it seems, for dividends which he was entitled to receive and failed to receive only in consequence of his own neglect.[262] These rules apply equally in the case of a composition with creditors. A debt which would not be barred by the bankrupt's discharge in the ordinary way will not be released by the composition proceedings, although the creditor is made a party thereto, and accepts his pro rata share of the composition fund.[263]

§ 747. Effect of Discharge as to Co-Debtors and Persons Jointly Liable.—The bankruptcy act provides that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."[264] This means that the liability of such persons shall not be canceled, released, diminished, or in any way affected by the discharge,[265] the intention of the statute being to make a discharge personal to the debtor, and not to release any other parties liable with him or liens not declared to be released.[266] And it is immaterial whether or not the creditor proves his claim in the bankruptcy proceedings,[267] or that he participates in a composition and consents to the discharge of the bankrupt thereby.[268] Bankruptcy proceedings, therefore, do not deprive a creditor of any right of action against third persons,[269] and the effect of the discharge in bankruptcy of one of the defendants in a pending suit is substantially the

[261] Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, 30 Am. Bankr. Rep. 31; Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; Standard Sewing Mach. Co. v. Kattell, 132 App. Div. 539, 117 N. Y. Supp. 32; Madison Tp. v. Dunkle, 114 Ind. 262, 16 N. E. 593; Stokes v. Mason, 10 R. I. 261, 12 N. B. R. 498; Talcott v. Harris, 18 Hun. (N. Y.) 567; Laramore v. McKinzie, 60 Ga. 532; McBean v. Fox, 1 Ill. App. 177; Katzenstein v. Reid, 41 Tex. Civ. App. 106, 91 S. W. 360. Compare Morse v. Lowell, 7 Metc. (Mass.) 152.

[262] Richmond v. Brown, 66 Me. 373.

[263] Bayly v. Washington & Lee University, 106 U. S. 11, 1 Sup. Ct. 88, 27 L. Ed. 97; In re Rodger, Fed. Cas. No. 11,991; Lewin v. Thurber, 62 Ga. 25; Leggett v. Barton, 40 N. J. Law, 83; Talcott v. Harris, 93 N. Y. 567; Scott v. Olmstead, 52 Vt. 211.

[264] Bankruptcy Act 1898, § 16.

[265] Elder v. Prussing, 101 Ill. App. 655; Ward v. Johnson, 13 Mass. 148; Edwards v. Coleman, 2 A. K. Marsh. (Ky.) 249; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Polk v. Stephens, 118 Ark. 438, 176 S. W. 689; Bass v. Geiger, 73 Fla. 312, 73 South. 796; Levy v. Barley, 211 Ill. App. 498; First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

[266] Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737.

[267] Gurley v. Robertson (Ala.) 59 South. 643.

[268] Hill v. Trainer, 49 Wis. 537, 5 N. W. 926.

[269] Mattone v. Illinois Surety Co., 123 N. Y. Supp. 236.

same as if he had died.[270] But as to a suit brought after the discharge, on a joint obligation of the bankrupt with others, the bankrupt is a necessary party to the action, because his discharge is a personal privilege which may be waived and which must be pleaded if he means to take advantage of it.[271] Where several persons jointly execute an undertaking in the name of a corporation, the fact that the creditor proved his claim in bankruptcy against the corporation does not estop him to sue on the individual liability of the persons executing the instrument.[272] The rule applies also to joint liabilities reduced to judgment. If one of two joint judgment debtors is discharged in bankruptcy, this does not affect the liability of the other,[273] or the right of the creditor to revive the judgment by scire facias against the defendant not discharged.[274] And where a discharged bankrupt applies for the cancellation of record of a judgment standing against him on a discharged debt (as is permitted by statute in some states), the court has no power to discharge the judgment as against the other defendants in the action.[275] The rule likewise applies to claims secured by lien. Thus, where one mortgages his land to secure the debt of another, the latter's discharge in bankruptcy, does not affect the mortgage or release the mortgagor.[276] So also as between the parties to negotiable instruments. The discharge in bankruptcy of the maker of a note does not release the indorser, and vice versa.[277] But a discharge obtained by a joint debtor is a bar to an action by his co-debtor for contribution.[278] Under the statutes of Washington, an adjudication of bankruptcy against a married man is also an adjudication against the community, and his discharge discharges the community.[279]

[270] Seymour v. O. S. Richardson Fueling Co., 103 Ill. App. 625.

[271] Jenks v. Opp, 43 Ind. 108. In an action against three obligors on a bond, where judgment goes for the plaintiff, the court will enter a special judgment against one of the defendants who has been discharged in bankruptcy, with a perpetual stay of execution against him. Wilcox v. Hersch (R. I.) 110 Atl. 409.

[272] Ridenour v. Mayo, 29 Ohio St. 138.

[273] Love v. McGill, 41 Tex. Civ. App. 471, 91 S. W. 246. But where a contractor, to whom material has been furnished, is discharged in bankruptcy prior to a judgment creating a lien for such material, the lien cannot thereafter be foreclosed against the property of the owner and a judgment rendered against him. Philip Carey Mfg. Co. v. Viaduct Place, 1 Ga. App. 707, 58 S. E. 274.

[274] Simpson v. Minnix, 30 App. D. C. 582.

[275] In re Quackenbush, 122 App. Div. 456, 106 N. Y. Supp. 773.

[276] Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Security Sav. Bank v. Scott, 3 Cal. App. 687, 86 Pac. 903.

[277] Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378, 16 N. B. R. 347; King v. Central Nat. Bank, 6 Ga. 257; Pratt v. Chase, 122 Mass. 262; Harwell v. Steel, 17 Ala. 372; Dundee Nat. Bank v. Strowbridge (Sup.) 184 N. Y. Supp. 257; Commercial Bank of Boonville v. Varnum, 176 Mo. App. 78, 162 S. W. 1080.

[278] Dean v. Speakman, 7 Blackf. (Ind.) 317; Frentress v. Markle, 2 G. Greene (Iowa) 553.

[279] Gibbons v. Dexter Horton Trust & Savings Bank (D. C.) 225 Fed. 424, 35 Am. Bankr. Rep. 632.

§ 748. Same; Sureties and Guarantors.—Under the provision of the bankruptcy act that the liability of persons who are guarantors or sureties for a bankrupt shall not be "altered" by his discharge, it is held that the liability of such persons is not in any way released, changed, or diminished by the discharge of the principal debtor.[280] As to the peculiar position of sureties on an appeal bond, there has been some difference of opinion. The general rule is that the surety on such a bond is not released by the discharge in bankruptcy of the principal debtor, though the judgment was upon a debt provable and dischargeable in bankruptcy, and that, in such a case, a judgment may be rendered against the bankrupt, but with a perpetual stay of execution, which will preserve the liability of the surety.[281] Some of the decisions do not admit this rule to its fullest extent, but hold that, where the liability of the surety has become fixed before the discharge is granted to the principal, by the affirmance of the judgment appealed from or by the rendition of a judgment on the bond, then the liability of the surety is not released or affected, even though the judgment becomes inoperative as against the principal debtor.[282] But where the appeal bond is conditioned on the affirmance of the judgment or the dismissal of the appeal, and no final judgment is rendered in the action because it is terminated by the principal's discharge in bankruptcy (as, where the appeal is taken from the judgment of a justice of the peace and the bankrupt pleads his discharge in the higher court), then the liability of the surety is extinguished along with that of the principal, or rather, there is no breach of the condition of the bond on which the surety could be held liable.[283] In the case of

[280] Leader v. Mattingly, 140 Ala. 444, 37 South. 270; Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; State v. Federal Union Surety Co., 156 Mo. App. 603, 137 S. W. 613; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680; Steinhauer & Wight v. Adair, 20 Ga. App. 733, 93 S. E. 280; Daniel v. Browder-Manget Co., 13 Ga. App. 392, 79 S. E. 237; First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13; McClintic-Marshall Co. v. City of New Bedford (Mass.) 131 N. E. 144. But a creditor suing the guarantor of the bankrupt's obligation will be subject to equities in the guarantor's favor growing out of the creditor's having collected collateral of the debtor hypothecated to it and later transferred to it by the debtor's trustee in bankruptcy at a fixed valuation. Neblett v. Cooper Grocery Co. (Tex. Civ. App.) 180 S. W. 1162.

[281] Vandiver v. American Can Co., 190 Ala. 352, 67 South. 299; Chewning v. Knight, 16 Ala. App. 357, 77 South. 969; James v. Harry Kitzenger & Co., 13 Ala. App. 448, 68 South. 582; Failor v. Wehe, 98 Kan. 325, 158 Pac. 74; Kohn, Weil & Co. v. Weinberg, 110 Miss. 275, 70 South. 353; Tutt v. Fighting Wolf Mining Co. (Mo. App.) 209 S. W. 304; Brown & Brown Coal Co. v. Antezak, 164 Mich. 110, 128 N. W. 774, 130 N. W. 305, Ann. Cas. 1912B, 778; Oberreich v. Foster, 152 Ill. App. 302; Sandusky v. Exchange Bank, 81 Ill. 353; Fisse v. Einstein, 5 Mo. App. 78; Hall v. Fowler, 6 Hill (N. Y.) 630; Knapp v. Anderson, 71 N. Y. 466.

[282] Slusher v. Hopkins, 97 S. W. 1128, 30 Ky. Law Rep. 257; St. Louis World Pub. Co. v. Rialto Grain & Securities Co., 108 Mo. App. 479, 83 S. W. 781; Williams & Freeman v. Bosworth (Miss.) 59 South. 6; Bailey v. Reeves (Miss.) 59 South. 802.

[283] Lafoon v. Kerner, 138 N. C. 281,

bonds given to release property from the lien of an attachment, the rule is modified by the consideration that an attachment lien is dissolved by operation of the bankruptcy act (in certain cases) if it attached within four months prior to the filing of the petition in bankruptcy, but not otherwise. Hence the general rule is that, if the bond makes the rendition of a judgment against the defendant in the action a condition precedent to any liability on the part of the surety, the defendant's discharge in bankruptcy will prevent the rendition of any general judgment against him, and to that extent prevent the happening of the event on which the surety's liability depends. But the court, in a proper case, may render a special judgment against the defendant, to enable the plaintiff to enforce the surety's liability on the bond, such special judgment containing a stipulation for a perpetual stay of execution against the defendant. And a proper case for the entry of such a judgment is presented when the proceeding in bankruptcy is not begun until more than four months after the laying of the attachment.[284] In regard to the somewhat similar case of a bond given to dissolve a garnishment, it has been held that the statute does not apply to the liability of a bankrupt's surety on such a bond given in a suit against the bankrupt on a provable debt, pending at the time the bankruptcy proceedings were instituted.[285] But a surety on an injunction bond given in a suit to restrain the enforcement of a judgment is not released from liability by the discharge of his principal in bankruptcy,[286] nor the surety on a forthcoming bond or redelivery bond or a claimant's bond given for goods taken on execution,[287] and the liability of a surety on a poor debtor's recognizance cannot be reduced to nominal damages by reason of the subsequent adjudication of the debtor as a bankrupt.[288] It is said, however, that the discharge in bankruptcy

50 S. E. 654; Goyer Co. v. Jones, 79 Miss. 253, 30 South. 651; Otto Young & Co. v. Howe, 150 Ala. 157, 43 South. 488; House v. Schnadig, 235 Ill. 301, 85 N. E. 395; Odell v. Wootten, 38 Ga. 224, 4 N. B. R. 183; Payne v. Able, 7 Bush (Ky.) 344, 3 Am. Rep. 516, 4 N. B. R. 220; Cisco Oil Mill v. Shepherd (Tex. Civ. App.) 183 S. W. 13.

[284] Schunack v. Art Metal Novelty Co., 84 Conn. 331, 80 Atl. 290; Crook Horner Co. v. Gilpin, 112 Md. 1, 75 Atl. 1049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376; United States Wind Engine & Pump Co. v. North Penn Iron Co., 227 Pa. St. 262, 75 Atl. 1094; Butterick Pub. Co. v. E. F. Bowen Co., 33 R. I. 40, 80 Atl. 277; Rice v. Nirdlinger, 41 Pa. Super. Ct. 238; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309. See Simon Casady & Co. v. Hartzell, 171 Iowa, 325, 151 N. W. 97.

[285] A. Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15. But see National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131.

[286] Stull v. Beddeo, 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507; Martin Furniture Co. v. Massey, 135 Tenn. 338, 186 S. W. 451.

[287] Evans v. Rea (Tex. Civ. App.) 193 S. W. 707; Pinkard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891; Cermak v. Aldrich, 209 Ill. App. 204; Evans v. Rea, 108 Tex. 260, 191 S. W. 1133; De Loach v. Kennedy, 23 Ga. App. 736, 99 S. E. 314.

[288] Carpenter v. Goddard, 191 Mass. 54, 76 N. E. 953.

of the principal in a bail bond given by him in a civil action, before the liability of the bail became fixed, is a discharge of the bond.[289]

But the provision of the statute is not restricted to the case of sureties on bonds given in judicial proceedings. It applies so as to prevent the release of a surety on a note by the discharge of the principal debtor,[290] and to the case of one who has guarantied the payment of the rent reserved in a lease to the bankrupt,[291] and to the surety on a bond given by a contractor for the erection of a bridge or building, the construction of a road, or other work.[292] The statute is not even restricted to cases of technical suretyship. Thus, where a partnership is dissolved and the debts are assumed by one of the partners, he becomes the principal debtor and the other partner assumes a position analogous to that of a surety. If then the principal debtor is discharged in bankruptcy, this will not release the other partner.[293] So, where a wife executes a mortgage on her own real estate for the purpose of securing the individual debt of her husband, she is his surety to the extent of the property which she mortgages, and the mortgage is not released by the husband's discharge in bankruptcy from the debt secured.[294]

§ 749. Same; Contribution Between Sureties.—A discharge in bankruptcy cannot be pleaded in defense to an action brought by one co-surety against another for contribution, when the entire debt of the principal, for which the parties were jointly bound as sureties, was paid by the plaintiff, thus founding his right to contribution, after the discharge of the defendant.[295] But if the obligation to make contribution became a fixed liability of the defendant before his discharge, it would naturally be a provable claim against his estate in bankruptcy, and so would be released by the discharge.

§ 750. Partnership and Individual Debts.—Where one member of a partnership files his voluntary petition in bankruptcy, seeking a discharge from both individual and firm debts, and lists both classes of debts

[289] Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, affirming 122 Ill. App. 60. And see Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 Atl. 380, 138 Am. St. Rep. 338; Jones v. State, 28 Ark. 119.

[290] Mace v. Wells, 7 How. 272, 12 L. Ed. 698; Hardy v. Carter, 8 Humph. (Tenn.) 153; Wolfboro Loan & Banking Co. v. Rollins, 195 Mass. 323, 81 N. E. 204; Cilley v. Colby, 61 N. H. 63; Buchholz v. Feustel, 179 Ill. App. 396.

[291] Witthaus v. Zimmermann, 91 App. Div. 202, 86 N. Y. Supp. 315; Dersch v. Walker, 89 S. W. 233, 28 Ky. Law Rep. 325; Rafferty v. Klein, 256 Pa. 481, 100 Atl. 945.

[292] Empire State Surety Co. v. City of Des Moines, 152 Iowa, 531, 131 N. W. 870, 132 N. W. 837; Kimmel v. State (Ind. App.) 130 N. E. 239.

[293] Schmitt v. Greenberg, 58 Misc. Rep. 570, 109 N. Y. Supp. 881.

[294] Burtis v. Wait, 33 Kan. 478, 6 Pac. 783.

[295] Dunn v. Sparks, 1 Ind. 397, 50 Am. Dec. 473; s. c., 7 Ind. 490; Dole v. Warren, 32 Me. 94, 52 Am. Dec. 640; Wyckoff v. Gardner (N. J.) 5 Atl. 801; Goss v. Gibson, 8 Humph. (Tenn.) 197; Liddell v. Wiswell, 59 Vt. 365, 8 Atl. 680; Byers v. Alcorn, 6 Ill. App. 39; Smith v. Hodson, 50 Wis. 279, 6 N. W. 812.

in his schedule, and is adjudged bankrupt, but no adjudication is made against the partnership as such, the creditors of the firm may prove their debts against the bankrupt, and cause his interest in the firm property to be subjected to the payment thereof; and if a proper foundation is laid in the pleadings and notices to creditors, the discharge granted to the bankrupt will release him from both classes of debts.[296] But if neither the petition for adjudication, the notice to creditors, nor the application for discharge makes any reference to partnership liabilities, or asks relief against firm debts, such debts will not be affected by the discharge.[297] In the individual bankruptcy of one partner, his co-partner may prove a claim against him for a liability growing out of the partnership affairs, if it is fixed and certain or capable of being liquidated, and the omission to prove it in this case will bring it within the operation of the discharge.[298] But where the partner in bankruptcy had assumed and agreed to pay the firm debts, on a previous dissolution, and a judgment is entered on a firm debt, which the other partner is compelled to pay, but after the commencement of the bankruptcy proceedings, and hence not in time for proof and allowance, the partner so paying may maintain an action to recover the amount paid, notwithstanding the discharge of the bankrupt.[299] Where one partner thus secures his release from the firm debts, the defense is personal to him and available only so far as his individual liability is concerned, and will not ordinarily affect the responsibility of the other partners.[300] But it has been held that a discharge in bankruptcy of one partner on a firm debt is a good defense to an action against the two partners to renew a judgment on a partnership debt, where it appeared that the process in the action was served only on the partner who had been discharge, and where the firm had been dissolved many years before, and the judgment creditor had actual knowledge that it had assigned the firm and individual property under the state insolvency law,

[296] Lesser v. Gray, 236 U. S. 70, 35 Sup. Ct. 227, 59 L. Ed. 666, 34 Am. Bankr. Rep. 8; Gordon v. Texas Co., 119 Me. 49, 109 Atl. 368; In re Diamond, 149 Fed. 407, 79 C. C. A. 227, 17 Am. Bankr. Rep. 563; In re Kaufman, 136 Fed. 262, 14 Am. Bankr. Rep. 393; Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 Am. Bankr. Rep. 751; In re Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1; Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, 3 Ann. Cas. 798; New York Institution for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Berry Bros. v. Sheehan, 115 App. Div. 488, 101 N. Y. Supp. 371. But compare In re Gruber, 129 App. Div. 297, 113 N. Y. Supp. 923; Dodge v. Kaufman, 46 Misc. Rep. 248, 91 N. Y. Supp. 727. And see Murphy v. Nicholson, 87 N. J. Law, 278, 94 Atl. 62.

[297] In re McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66.

[298] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

[299] Ogilby v. Munro, 52 Misc. Rep. 170, 101 N. Y. Supp. 753; Hefner v. Hefner, 26 S. D. 704, 127 N. W. 634.

[300] Kimmel v. State (Ind. App.) 130 N. E. 239.

and where it did not appear that any firm assets existed, provided that the claim was properly scheduled and notice thereof duly given.[301]

But individual partners cannot be discharged from partnership debts under an adjudication against the partnership only; and the discharge of a firm, where the partners are not severally adjudicated bankrupt, does not release them personally from the partnership debts.[302] If some of the members of a bankrupt firm wrongfully converted stock certificates, so as to create a liability for "willful and malicious injury to the property of another," not dischargeable in bankruptcy, those members of the firm who did not participate in such wrongful acts are nevertheless not released from liability for such debts by the discharge in bankruptcy.[303]

§ 751. Discharge of Corporation and Effect on Liabilities of Officers and Stockholders.—Since the effect of a discharge in bankruptcy is to release only the bankrupt's personal liability, and since the sixteenth section of the bankruptcy act expressly provides that "the liability of a person who is co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt," the discharge of a bankrupt corporation does not release its stockholders, directors, or officers from any statutory liability imposed upon them to be answerable, in whole or in part, for the debts of the corporation; and if the law of the state makes the recovery of a judgment against the corporation a prerequisite to any proceeding against the stockholders or officers, the discharge of the corporation will not prevent creditors from subsequently taking judgment against it in a state court in such limited form as may enable them to enforce the secondary liability of the stockholders or officers.[304] And the fact that creditors may have proved their claims in bankruptcy against the corporation, and received dividends thereon, does not prevent them from collecting the unpaid balance in this way.[305] Further, the fact that a

[301] Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, 3 Ann. Cas. 798.

[302] In re Pineus, 147 Fed. 621, 17 Am. Bankr. Rep. 331; In re Bertenshaw, 157 Fed. 363, 19 Am. Bankr. Rep. 577; Schroeder v. Frey, 60 Hun, 58, 14 N. Y. Supp. 71; Wm. R. Moore Dry Goods Co. v. Ford (Ark.) 225 S. W. 320. But see Young v. Stevenson, 73 Ark. 480, 84 S. W. 623. And compare Abbott v. Anderson, 184 Ill. App. 598.

[303] Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135.

[304] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; s. c., 95 Fed. 419, 2 Am. Bankr. Rep. 653; Elsbree v. Burt, 24 R. I. 322, 53 Atl. 60; Way v. Barney, 116 Minn. 285, 133 N. W. 801, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913A, 719; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F, 106.

[305] First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

corporation has been adjudged bankrupt does not relieve stockholders of debts contracted as partners.[306]

§ 752. **Effect of Discharge as to Securities and Liens.**—While a discharge in bankruptcy releases the debtor from personal liability for the debts proved and frees his after-acquired property from the claims of creditors, it does not divest or in any way affect a valid lien existing on property of the bankrupt, provided, first, that the lien is not of the kind stricken down by the commencement of bankruptcy proceedings within four months after its inception, and second, that the property has not been brought within the jurisdiction of the bankruptcy court and administered by it.[307] In the latter case, of course, the rights of the lien creditor will be adequately safeguarded.[308] And where a debt is discharged in bankruptcy pending an action in a state court to recover the same, and there is a lien created by law incident to such debt, a plea in bar of further proceedings in the case will not preclude the court from rendering such a judgment as may be necessary to enable the plaintiff to enforce the lien.[309] This rule applies (among others) to mechanics' liens,[310] and to a vendor's lien for purchase money, where such a lien is recognized by the laws of the particular state,[311] and to an equitable lien,[312] and to a suit by a creditor to enforce a trust in land held by the debtor's wife.[313] So, a discharge in bankruptcy se-

[306] Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 South. 504.

[307] Butler Cotton Oil Co. v. Collins (Ala.) 75 South. 975; Gray v. Bank of Hartford, 137 Ark. 232, 208 S. W. 302; American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692; Wills v. E. K. Wood Lumber & Mill Co., 29 Cal. App. 97, 154 Pac. 613; Frey v. McGaw, 127 Md. 23, 95 Atl. 960, L. R. A. 1916D, 113; Paxton v. Scott, 66 Neb. 385, 92 N. W. 611; Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Taylor v. Marshall, 153 Ill. App. 409; Morganstein v. Commercial Nat. Bank, 125 Ill. App. 397; McDonald v. H. E. Taylor & Co., 144 App. Div. 329, 128 N. Y. Supp. 1048; Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189; Stevenson v. Bird, 168 Ala. 422, 53 South. 93; Newberry Shoe Co. v. Collier, 111 Va. 288, 68 S. E. 974; John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292; Causey Lumber Co. v. Connor, 6 Ga. App. 444, 65 S. E. 194; McCall v. Herring, 116 Ga. 235, 42 S. E. 468; Philmon v. Marshall, 116 Ga. 811, 43 S. E. 48; Evans v. Rounsaville, 115 Ga. 684, 42 S. E. 100; Smith v. Zachry, 115 Ga. 722, 42 S. E. 102; Darling v. Woodward, 54 Vt. 101.

[308] First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

[309] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

[310] Jensen v. Dorr, 23 Cal. App. 701, 139 Pac. 659; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 205, 186 S. W. 115, L. R. A. 1916F, 106; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; McCullough v. Caldwell, 5 Ark. 237; Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553. See Ricks v. Smith, 20 Ga. App. 491, 93 S. E. 116.

[311] Graves v. Coutant, 31 N. J. Eq. 763; White v. Hartman, 26 Colo. App. 475, 145 Pac. 716. See Graham v. Richerson, 115 Ga. 1002, 42 S. E. 374; Pace v. Berry, 176 Ky. 61, 195 S. W. 131.

[312] Eisman v. Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072.

[313] Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

cured by the debtor in a judgment, without notice to an attorney, who had filed a lien against the judgment for his fee, no mention of the lien having been made in the schedule of debts, does not discharge the attorney's interest in the judgment or bar his right to use the judgment to collect the amount of his lien.[314] And the right created by the assignment, as security, of one's expectancy in the estate of his living ancestor is a lien enforceable against him after his discharge in bankruptcy.[315] But the right of a judgment creditor to proceed under a state statute to reach the excess above the statutory homestead valuation of the homestead of the debtor is destroyed by the latter's discharge in bankruptcy, if the judgment was based on a claim provable in bankruptcy, and no proceedings to reach the homestead had been begun at the time of the discharge.[316]

In regard to an assignment of wages, it appears that a discharge in bankruptcy will not defeat the right of the assignee to recover the wages in so far as the same have been earned and assigned before the discharge,[317] though it will release the bankrupt from personal liability.[318] But an assignment, as security for a debt, of wages thereafter to be earned by the debtor, either under a general or specific employment, creates no lien until the wages have been earned, and where, before that time, the debtor is adjudged a bankrupt and is subsequently discharged, the debt is extinguished from the date of the adjudication, and no lien arises as to wages earned thereafter, but the same become the property of the bankrupt free from the claims of all his creditors, including the assignee.[319]

§ 753. Same; Attachment and Garnishment.—In certain circumstances the bankruptcy act destroys the lien of an attachment levied within four months prior to the institution of bankruptcy proceedings.

[314] Lown v. Casselman (N. D.) 141 N. W. 73.

[315] Bridge v. Kedon, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404; Dumont, Roberts & Co. v. McDougal, 200 Ill. App. 583.

[316] Boggs v. Dunn, 160 Cal. 283, 116 Pac. 743.

[317] Wabash R. Co. v. Meyer, 119 Ill. App. 108; Raulins v. Levi, 232 Mass. 42, 121 N. E. 500.

[318] Mitchell v. Leland, 190 Mass. 258, 76 N. E. 670.

[319] Draeger v. Wisconsin Steel Co., 194 Ill. App. 440; Hupp v. Union Pac. R. Co., 99 Neb. 654, 157 N. W. 343, L. R. A. 1916E, 247; Rate v. American Smelting & Refining Co., 56 Mont. 277, 184 Pac. 478; In re West, 128 Fed. 205, 11 Am. Bankr. Rep. 782; In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168; In re Ludeke, 171 Fed. 292, 22 Am. Bankr. Rep. 467; Leitch v. Northern Pac. Ry. Co., 95 Minn. 35, 103 N. W. 704, 5 Ann Cas. 63; Levi v. Loevenhart & Co., 138 Ky. 133, 127 S. W. 748, 30 L. R. A. (N. S.) 375, 137 Am. St. Rep. 377. But compare Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Citizens' Loan Ass'n v. Boston & M. R. R., 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365. And see Monarch Discount Co. v. Chesapeake & O. Ry. Co., 285 Ill. 233, 120 N. E. 743.

Where these circumstances concur, and the debt in question is one provable in the bankruptcy, not only will the lien of the attachment be dissolved, but the liability of sureties on a bond given to dissolve the attachment will be released by the debtor's discharge in bankruptcy.[320] But in cases where the attachment was levied more than four months before the bankruptcy and is otherwise valid, it will not be dissolved or released by the discharge of the bankrupt, though the original debt may be extinguished thereby.[321] In that case, the plaintiff in attachment is entitled to the entry of a special judgment enforceable only against the attached property and an execution in accordance therewith.[322] And a judgment against the bankrupt which is specified to be enforceable against certain attached property and not otherwise, though in form a judgment for money, sufficiently recognizes the effect of his discharge and protects him against any unsatisfied balance of the debt after execution sale.[323] If the attached property has already been released, on the execution of a forthcoming bond, recognizance, or other obligation permitted by the local practice, there is nothing in the bankruptcy act to prevent the rendition of a formal judgment against the bankrupt defendant, with a perpetual stay of execution, so as to enable the plaintiff to proceed against the sureties on such bond or obligation.[324] The rules are much the same in the case of a garnishment. In some states, the interest which the plaintiff acquires in the property or credits of the defendant, by service of garnishee process on a person liable to the defendant as a debtor or a custodian of his property, is recognized as a lien, and an action pending to recover a debt which has been discharged in bankruptcy, having a garnishee action incidental thereto, will survive

320 Windisch-Muhlhauser Brewing Co. v. Simms, 129 La. 134, 55 South. 739; Sanderson v. Buckley, 111 Miss. 748, 72 South. 148.

321 In re Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 633; Grandin v. First Nat. Bank, 70 Neb. 730, 98 N. W. 70; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Sims v. Jacobson, 51 Ala. 186. Where the bankrupt, sued more than four months before the petition, deposited with plaintiff's counsel a sum of money which was to stand in lieu of an attachment, the discharge in bankruptcy barred the creditor's right to such fund, there being no lien perfected by injunction or attachment. Fingold v. Schachter, 223 Mass. 274, 111 N. E. 903.

322 Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 Atl. 515; Johnson v. Collins, 116 Mass. 392; Stockwell v. Silloway, 113 Mass. 382; Bosworth v. Pomeroy, 112 Mass. 293; Bates v. Tappan, 99 Mass. 376; Davenport v. Tilton, 10 Metc. (Mass.) 320.

323 F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110.

324 Hill v. Harding, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083; C. D. Smith & Co. v. Lacey, 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707; Barnstable Sav. Bank v. Higgins, 124 Mass. 115; Danforth Mfg. Co. v. M. L. Barrett & Co., 138 Ill. App. 244. See Hamilton v. Bryant, 114 Mass. 543, 14 N. B. R. 479; Carpenter v. Turrell, 100 Mass. 450; Van Zandt Jacobs & Co. v. Steiber, 90 Conn. 507, 97 Atl. 763; Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858; Light v. Hunt, 17 Ga. App. 491, 87 S. E. 763.

the discharge, so far as to permit a judgment in form against the defendant, enforceable as to the equitable lien secured in the garnishee action.[325] And if so broad a rule as this might not be recognized in all jurisdictions, at least it is held that where a judgment lien has been obtained against the property of the garnishee, the discharge in bankruptcy of the principal debtor will not release the lien.[326]

§ 754. Same; Lien by Creditor's Suit.—A suit by a judgment creditor to set aside an alleged fraudulent conveyance and subject the property to his claim is not barred by the discharge in bankruptcy of the debtor pending the action,[327] but the suit may proceed as an action in rem against the property affected and on which it creates a lien, although the person and future assets of the debtor have been exonerated by the discharge,[328] provided, of course, that the land in suit has not been brought within the jurisdiction of the court of bankruptcy and there administered.[329] So, the lien obtained on an equitable interest of a judgment debtor by the institution of a creditor's action to reach such interest is not lost by the subsequent discharge in bankruptcy of the judgment debtor.[330]

§ 755. Same; Mortgages.—Since a bankrupt's equity of redemption in mortgaged premises, if it has any value, is an asset which must be made available for the satisfaction of his general creditors,[331] it is within the jurisdiction of the court of bankruptcy to stay a pending foreclosure of the mortgage in a state court,[332] to allow the trustee to redeem from the mortgage,[333] or to order the sale of the mortgaged property either subject to the mortgage or free from its lien.[334] But if the rights of the mortgage creditor are not in some such way brought into the

[325] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655; Friedman v. Gibbons, 101 Misc. Rep. 356, 167 N. Y. Supp. 685; Rosen v. Wygand, 174 N. Y. Supp. 672.

[326] Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737. But see Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[327] Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; Flint v. Chaloupka, 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309, 126 Am. St. Rep. 639.

[328] Phelps v. Curts, 80 Ill. 109, 16 N. B. R. 85; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[329] Flint v. Chaloupka, 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309, 126 Am. St. Rep. 639.

[330] Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137. But see Bowen & Thomas v. Keller, 130 Ga. 31, 60 S. E. 174, 124 Am. St. Rep. 164, as to a suit in rem by a creditor (not holding a lien) to reach exempt property of the bankrupt, homestead rights having been waived as to the particular debt.

[331] Supra, § 325.

[332] Supra, §§ 190, 569.

[333] Supra, §§ 305, 570.

[334] Supra, §§ 470, 471, 571. Where the maker of notes secured by a chattel mortgage filed his petition in bankruptcy, and the holder was allowed his claim against the bankrupt estate, and the mortgaged property was sold by the bankrupt's trustee under agreement with the holder, the discharge in bankruptcy would release any unsold property from the lien. First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

bankruptcy court for adjudication, or voluntarily submitted by him to that court, and assuming the mortgage not to be voidable as either a preference or a fraudulent transfer of property, then the lien of it is not divested or in any way affected by the discharge of the mortgagor in bankruptcy, though the debt secured be provable and so dischargeable.[335] And although a discharge in bankruptcy frees the after-acquired property of the bankrupt from liability for his prior debts, so that it cannot be taken in execution for them, yet it does not affect the lien of a mortgage previously made by the bankrupt, for a valuable consideration on a contingent interest which vests after the discharge,[336] or on a new or more perfect title subsequently acquired by the bankrupt to the same property.[337] And where a deed to land executed by the defendant was in fact a mortgage, the fact that his equity was not scheduled as a part of his assets in subsequent bankruptcy proceedings is no ground for an adjudication of the fee title in the plaintiff after the discharge of the trustee in bankruptcy.[338] But a discharge of the mortgagor in bankruptcy pending foreclosure proceedings will prevent the subsequent rendition of a decree for the deficiency.[339] Where, however, the mortgagor went through bankruptcy and obtained his discharge, without the mortgagee having any notice of the bankruptcy proceedings, and, in a foreclosure suit, the mortgagor failed to appear and plead his discharge, it was held that a deficiency decree was properly entered against him.[340]

§ 756. **Effect of Discharge on Rights as to Judgment and Execution.** —A judgment recovered against the bankrupt before the filing of the petition is a provable debt against his estate and therefore will be barred by his discharge; and the fact that he went into bankruptcy for the express purpose of avoiding a particular judgment does not limit the legal effect of the discharge.[341] But the lien of a judgment rendered, or of an execution levied, more than four months before the commencement

[335] Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276; Butler Cotton Oil Co. v. Collins, 200 Ala. 217, 75 South. 975; Copper Belle Min. Co. v. Costello, 12 Ariz. 318, 100 Pac. 807; Security Sav. Bank v. Scott, 3 Cal. App. 687, 86 Pac. 903; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004; Camp v. Young, 119 Ga. 981, 47 S. E. 560; Johnson v. Whitley Grocery Co., 112 Ga. 449, 37 S. E. 766; Catterlin v. Armstrong, 101 Ind. 258; Schexnailder v. Fontenot, 147 La. 467, 85 South. 207; Laurel Oil & Fertilizer Co. v. Horne, 101 Miss. 629, 57 South. 624, 58 South. 652; Hoeffler Mfg. Co. v. Machajewski, 163 Wis. 184, 157 N. W. 702.

[336] Oliphint v. Eckerley, 36 Ark. 69; Haggerty v. Byrne, 75 Ind. 499; Bisby v. Walker, 185 Iowa, 743, 169 N. W. 467.

[337] Haggerty v. Byrne, 75 Ind. 499; Adam v. McClintock, 21 N. D. 483, 131 N. W. 394.

[338] Horn v. Bates (Ky.) 114 S. W. 763.

[339] Prentis v. Richardson's Estate, 118 Mich. 259, 76 N. W. 381.

[340] Hanson v. Smith, 187 Ill. App. 350.

[341] Finnegan v. Hall, 35 Misc. Rep. 773, 72 N. Y. Supp. 347; Kruegel v. Murphy & Bolanz (Tex. Civ. App.) 177 S. W. 1018.

of the bankruptcy proceedings is not extinguished by the discharge, where the holder of the judgment does not prove it as a debt against the estate,[342] or where the property affected did not pass to the trustee in bankruptcy as a part of the estate by reason of a right of homestead exemption existing at the date of the adjudication,[343] and even though a judgment creditor proves his claim against the estate, but receives nothing therefrom, if there is nothing to show that he has surrendered or waived the lien of his judgment on land not sold by the trustee, such lien will not be affected by the discharge.[344]

If a judgment is rendered against a debtor after he is adjudged a bankrupt, but before the granting of his discharge, the judgment is canceled by the discharge in so far as concerns the personal liability of the debtor and his after-acquired property, provided the debt in suit existed as a provable claim at the commencement of the bankruptcy proceedings and was of such a character that it would be released by the discharge.[345] Under former bankruptcy laws it was sometimes argued, in cases of this kind, that although the original debt might be provable and dischargeable in bankruptcy, yet the rendition of the judgment constituted a new debt, merging the original claim, and the judgment could not be affected by the discharge, not being a provable debt because not in existence at the commencement of the proceedings. But the courts refused to allow this contention.[346] And the point is met by the provision of the present bankruptcy act that provable claims against an estate shall include such as are "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge."[347] And the application of the rule is not altered by the fact that the bankrupt, having a suit pend-

[342] Camp v. Young, 119 Ga. 981, 47 S. E. 560; Pinkard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891; Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39; Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. Supp. 80; Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. Supp. 50; Realty Co. v. Gioshio, 50 Pa. Super. Ct. 185.

[343] Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75, 37 L. R. A. (N. S.) 156; Kener v. La Grange Mills, 135 Ga. 730, 70 S. E. 245; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004.

[344] McCarty v. Light, 155 App. Div. 36, 139 N. Y. Supp. 853; Oilfields Syndicate v. American Improvement Co. (D. C.) 256 Fed. 979, 43 Am. Bankr. Rep. 325; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

[345] Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Cavanaugh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; Grosso v. Marx, 45 Misc. Rep. 500, 92 N. Y. Supp. 773; Aiken v. Haskins, 34 Misc. Rep. 505, 70 N. Y. Supp. 293; Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553; H. T. Hackney Co. v. Noe, 146 Ky. 818, 143 S. W. 418; Smith v. Kinney, 6 Neb. 447; Huntington v. Saunders, 166 Mass. 92, 43 N. E. 1035; Sanderson v. Daily, 83 N. C. 67; Curtis v. Slosson, 6 Pa. St. 265; Locheimer v. Stewart, 91 Tenn. 385, 19 S. W. 21, 30 Am. St. Rep. 887; Downer v. Rowell, 26 Vt. 397; Blair v. Carter, 78 Va. 621; Leonard v. Yohnk, 68 Wis. 587, 32 N. W. 702, 60 Am. Rep. 884; Valdosta Guano Co. v. Green & Sutton, 149 Ga. 610, 101 S. E. 538.

[346] Braman v. Snider, 21 Fed. 871; Mulhagen v. Carter, 6 Ky. Law Rep. 735.

[347] Bankruptcy Act 1898, § 63a, cl. 5.

ing against him at the time of the adjudication, omits to bring such adjudication to the notice of the court or to ask for a stay of the proceedings, but defends on the merits. None the less, if the judgment is rendered before the discharge is granted it will be barred thereby.[348] There has, however, been some uncertainty as to the method of claiming the benefit of a discharge as against a previous outstanding judgment. Clearly, an execution issued on such a judgment cannot be enforced against any property of the bankrupt acquired after the discharge,[349] and it is said that the officer holding the writ must take notice of the bankruptcy of the defendant, and disregard all property which is not subject to the specific lien of the judgment.[350] And the creditor has no right to have process issued for the enforcement of a judgment which is barred or released by the discharge in bankruptcy,[351] and if he applies for leave to issue execution it will be denied.[352] But if nevertheless execution is issued on the judgment, it has been held that it is not void, but only voidable at the instance of the bankrupt,[353] and he cannot (unless some local statute authorizes it) move to have the discharge entered of record for the purpose of preventing the issue of an execution not actually sued out.[354] But it seems he may move to have an outstanding execution stayed or quashed.[355] And according to the best modern doctrine, it is the right of the bankrupt, on motion, and without waiting for process on the judgment to be issued, to have its execution enjoined or perpetually stayed.[356] The discharge in bankruptcy will

[348] Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Pine Hill Coal Co. v. Harris, 86 Ky. 421, 6 S. W. 24; Anderson v. Anderson, 65 Ga. 518, 38 Am. Rep. 797; Widner v. Yeast, 32 Kan. 400, 4 Pac. 838; Williams v. Humphreys, 50 N. J. Law, 500, 14 Atl. 583; Rogers v. Western Marine & Fire Ins. Co., 1 La. Ann. 161; West Philadelphia Bank v. Gerry, 106 N. Y. 467, 13 N. E. 453; Zumbro v. Stump, 38 W. Va. 325, 18 S. E. 443.

[349] Peterson v. Calhoun, 137 Ga. 799, 74 S. E. 519; Brooks v. Eblen, 106 S. W. 308, 32 Ky. Law Rep. 543; Ford v. Blackshear Mfg. Co., 140 Ga. 670, 79 S. E. 576. This rule applies to executions issued under Code Civ. Proc. N. Y. § 1391, as to an execution against wages being a lien and continuing levy upon wages due or to become due, and the debtor's discharge in bankruptcy, the judgment having been duly proven and allowed, frees his salary from the effects of such an execution in so far as concerns payments subsequent to the date of the adjudication. Brenen v. Dahlstrom Metallic Door Co., 189 App. Div. 685, 178 N. Y. Supp. 846.

[350] McCance v. Taylor, 10 Grat. (Va.) 580.

[351] Kruegel v. Murphy & Bolanz, 59 Tex. Civ. App. 482, 126 S. W. 680.

[352] Cohen v. Pinkus, 126 App. Div. 792, 111 N. Y. Supp. 82.

[353] Cogburn v. Spence, 15 Ala. 549, 50 Am. Dec. 140; Roden v. Jaco, 17 Ala. 344. Compare Ewing v. Peck, 26 Ala. 413.

[354] Brown v. Branch Bank at Montgomery, 20 Ala. 420.

[355] Cogburn v. Spence, 15 Ala. 549, 50 Am. Dec. 140; Alabama Great Southern Ry. Co. v. Crawley, 118 Miss. 272, 79 South. 94. But where, pending a motion by a judgment defendant to quash an execution on the ground of his discharge in bankruptcy, plaintiff issues a pluries execution, which defendant voluntarily pays, under no mistake as to his rights, he cannot recover it. Ewing v. Peck, 26 Ala. 413.

[356] Barnes Mfg. Co. v. Norden, 67 N. J. Law, 433, 51 Atl. 454; Chamberlain

also be a complete defense to an action on the judgment,[357] or to a writ of scire facias to revive it,[358] or an order in supplemental proceedings requiring the bankrupt to pay it,[359] or a proceeding in rem in equity against exempt property set apart to the bankrupt.[360] And although it is a general rule that a discharge in bankruptcy is personal and can be pleaded by the bankrupt alone, yet this does not apply to a third person holding title to land derived from the bankrupt, when the attempt is made to subject it to the lien of a judgment recovered against the bankrupt after his adjudication but before his discharge. Here the owner is entitled to defend his own title by defending that of his vendor, and this can be done only by setting up the discharge in bankruptcy.[361] But whenever the attempt is made to escape liability on a judgment so rendered, the creditor may show, if such is the fact, that the debt or claim in suit was of such a character as to be excepted from the operation of the discharge.[362]

If the action is still pending at the time of the granting of a discharge in bankruptcy, it is the right of the defendant to plead the discharge in bar of its further prosecution, and the effect is to preclude the court from entering any personal decree against him.[363] But an order on a discharge in bankruptcy providing that it shall not affect a certain pending case until final judgment therein, and that as to such judgment the discharge shall have the same force as it would have had if the judgment had been recovered after the application for discharge and before the granting of the same, permits the prosecution of such suit.[364]

v. Gurney, 1 How. Prac. (N. Y.) 238; Parks v. Goodwin, 1 Mich. 35; Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737; Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411; Dick v. Powell, 2 Swan (Tenn.) 632; In re Levitan (D. C.) 224 Fed. 241, 34 Am. Bankr. Rep. 789; Morris v. Perkins, 148 Ga. 554, 97 S. E. 526; Strickland v. Brown, 19 Ga. App. 73, 90 S. E. 1039.

[357] Locheimer v. Stewart, 91 Tenn. 385, 19 S. W. 21, 30 Am. St. Rep. 887; McDonald v. Davis, 105 N. Y. 508, 12 N. E. 40.

[358] Troop v. Griffin, 180 Pa. St. 452, 36 Atl. 865; Morrow v. Pfleiderer, 4 Ohio App. 283. Where plaintiff's judgment was scheduled by the bankrupt, and plaintiff satisfied it of record on the bankrupt's assigning to him a judgment against a third person, which transaction was in violation of Bankruptcy Act, § 29b, cl. 4, and thereafter the plaintiff asked to have his judgment reinstated because the defendant had made fraudulent representations as to the judgment assigned, it was held that, because of the fraud of both parties, they should be left in the same position as they were after the satisfaction of the judgment. Wetter v. Russell, 104 Misc. Rep. 599, 172 N. Y. Supp. 224.

[359] Gardiner v. Ross, 19 S. D. 497, 104 N. W. 220.

[360] Richards v. Shields, 138 Ga. 583, 75 S. E. 602; Blair v. Carter's Adm'r, 78 Va. 621.

[361] Blair v. Carter's Adm'r, 78 Va. 621. As to the enforcement of the judgment against property which had been fraudulently conveyed by the bankrupt, see Deposit Nat. Bank v. Hay, 262 Pa. 388, 105 Atl. 463.

[362] Linn v. Hamilton, 34 N. J. Law, 305; Taylor v. Buser (Sup.) 167 N. Y. Supp. 887.

[363] Phelps v. Curts, 80 Ill. 109, 16 N. B. R. 85.

[364] Standard Sewing Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

And even as against a plea of discharge, it is permissible for the court to enter a special judgment against the bankrupt with a perpetual stay of execution, where this course is necessary to enable the plaintiff to take measures against persons secondarily liable, such as sureties on bonds.[365] And where the defendant, in an action on a judgment, had the right when the action was brought to set off against the plaintiff's judgment his own judgment against the plaintiff, such right is not affected by the plaintiff's subsequent discharge in bankruptcy.[366]

§ 757. **Same; Cancellation of Judgment of Record.**—A statute in New York provides that, at any time after one year has elapsed since a bankrupt was discharged of his debts pursuant to acts of Congress, he may apply to a court in which a judgment was rendered against him, and obtain an order directing the judgment to be canceled, if it appears that he has been discharged from payment of the judgment or the debt upon which it was recovered.[367] And similar laws are in force in some other states.[368] These statutes are mandatory,[369] and delay of the debtor in applying for his discharge is not ground for refusing to cancel such a judgment.[370] Neither should costs be imposed on the bankrupt on granting his motion to cancel a judgment.[371] He is still entitled to avail himself of this statute although he had an opportunity to plead his discharge in bar of the action in which the judgment was rendered, when leave to do so was coupled with conditions and he declined to avail himself of it,[372] though not where his counsel consented to the entry of judgment for the amount claimed.[373] Further, a statute of this kind is applicable only to judgments entered before the granting of the discharge,[374] and only to judgments on dischargeable debts. That is, the court, on such a motion, may look behind the judgment to determine the character of the liability on which it was founded, and refuse the motion if the debt was one from which a discharge would not release the bankrupt.[375] For this reason also, the statute does not require the cancellation of a judgment not duly scheduled by the bankrupt,

[365] Kendrick & Roberts v. Warren Bros. Co., 110 Md. 47, 72 Atl. 461; Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512. See House v. Schnadig, 138 Ill. App. 498.

[366] Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189.

[367] Code Civ. Proc. N. Y. § 1268.

[368] Laws N. Dak. 1905, c. 125.

[369] Walker v. Muir, 127 App. Div. 163, 111 N. Y. Supp. 465, affirmed 194 N. Y. 420, 87 N. E. 680; John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292; Rukeyser v. Tostevin, 188 App. Div. 629, 177 N. Y. Supp. 291.

[370] Eberspacher v. Boehm, 58 Hun, 603, 11 N. Y. Supp. 404.

[371] Briefer v. Johnsen, 32 Misc. Rep. 764, 66 N. Y. Supp. 477.

[372] Hussey v. Judson, 43 Misc. Rep. 370, 87 N. Y. Supp. 499.

[373] Stevens v. Meyers, 72 App. Div. 128, 76 N. Y. Supp. 332.

[374] Howe v. Noyes, 47 Misc. Rep. 338, 93 N. Y. Supp. 476.

[375] Maier v. Maier, 77 Misc. Rep. 145, 135 N. Y. Supp. 1038. See Balliett v. Dearborn, 27 Fed. 507.

as the bankruptcy act excepts debts not scheduled from the operation of the discharge.[376] Again, this statute was not intended to enlarge the scope of the bankruptcy act by rendering null and void a lien which had been acquired in good faith more than four months prior to the commencement of the bankruptcy proceedings, and therefore, if the particular judgment is a lien on real estate, meeting these conditions, an order for its cancellation will contain a reservation of the creditor's right to enforce his lien.[377] The benefit of a statutory provision of this kind may be claimed, not only by the bankrupt himself, but also by an owner of land on which a judgment against the bankrupt is an apparent lien.[378] But the failure of the bankrupt to avail himself of the statute does not in any manner authorize the enforcement of a judgment which was discharged by the bankruptcy proceedings.[379] If the judgment creditor is aggrieved by the granting of a motion for cancellation, the proper practice is for him to appeal from the order, or ask leave to reargue but not to move to vacate it.[380]

[376] Feldmark v. Weinstein, 45 Misc. Rep. 329, 90 N. Y. Supp. 478; Woodward v. Schaefer, 91 N. Y. Supp. 104. See West Philadelphia Bank v. Gerry, 106 N. Y. 467, 13 N. E. 453.

[377] Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. Supp. 50; In re David, 44 Misc. Rep. 516, 90 N. Y. Supp. 85; Popham v. Barretto, 20 Hun (N. Y.) 299; Arnold v. Treviranus, 78 App. Div. 589, 79 N. Y. Supp. 732; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

[378] Graber v. Gault, 103 App. Div. 511,

[379] Leo v. Joseph, 56 Hun, 644, 9 N. Y. Supp. 612.

[380] McKee v. Preble, 154 App. Div. 156, 138 N. Y. Supp. 915.

CHAPTER XXXV

REVIVAL OF DEBTS BARRED BY DISCHARGE

§ 758. Validity and Consideration.—Although a discharge in bankruptcy releases the debtor from all legal liability to pay a debt which was provable in the bankruptcy proceedings, and which was not within the excepted classes, yet it does not extinguish the debt so as to make it incapable of revival. And although all remedies for the enforcement of such a debt are lost by the discharge, yet there remains a moral obligation upon the debtor to pay in full; and while this obligation is not one which can be enforced by suit, yet it furnishes a good and sufficient consideration for a new promise to pay the debt, and such a promise unequivocally given is binding on the debtor,[1] and may be enforced, notwithstanding the discharge of the bankrupt, in an action at law or any other proper form of proceeding.[2] So also, if a debtor, having been dis-

[1] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493; Cobb v. First Nat. Bank (D. C.) 263 Fed. 1000, 45 Am. Bankr. Rep. 48; Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S. E. 56; Cauley v. Dunn, 167 N. C. 32, 83 S. E. 16; Ferguson-McKinney Dry Goods Co. v. Beuckman, 198 Mo. App. 41, 198 S. W. 504; Mutual Reserve Fund Life Ass'n v. Beatty, 93 Fed. 747, 35 C. C. A. 573, 2 Am. Bankr. Rep. 244; Lambert v. Schmalz, 118 Cal. 33, 50 Pac. 13; Old Town Nat. Bank v. Parker, 121 Md. 61, 87 Atl. 1105; In re Burton, 29 Fed. 637; German Exchange Bank v. Schnitzer, 72 Misc. Rep. 362, 130 N. Y. Supp. 223; Stern v. Bradner, Smith & Co., 127 Ill. App. 640; Anthony v. Sturdivant, 174 Ala. 521, 56 South. 571; McNair v. Gilbert, 3 Wend. (N. Y.) 344; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Ogden v. Redd, 13 Bush (Ky.) 581; Ford v. Sidebottom, 5 Ky. Law Rep. 316; Ross v. Jordan, 62 Ga. 298; Carey v. Hess, 112 Ind. 398, 14 N. E. 235; Succession of Andrieu, 44 La. Ann. 103, 10 South. 388; Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Edwards v. Nelson, 51 Mich. 121, 16 N. W. 261; Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Second Nat. Bank v. Wood, 59 N. H. 407; Hobaugh v. Murphy, 114 Pa. St. 358, 7 Atl. 139; Murphy v. Crawford, 114 Pa. St. 496, 7 Atl. 142; Wells v. Mace, 17 Vt. 503.

[2] Torry v. Krauss, 149 Ala. 200, 43 South. 184; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Williams v. Robbins, 32 Me. 181; Briggs v. Sutton, 20 N. J. Law, 581; Hopkins v. Ward, 67 Barb. (N. Y.) 452; Kearns v. Boyle, 13 Phila. (Pa.) 193; Katz v. Moessenger, 110 Ill. 372. A promise by a debtor, who has been discharged in bankruptcy, to pay the balance of the debt remaining, is a waiver of the defense which the law gives him against an action on the original de-

charged in bankruptcy, gives his note to a particular creditor for the unpaid balance of the latter's claim, the moral obligation to pay constitutes a sufficient consideration for the note and will support an action on it.[3] The effect of a discharge obtained by means of a composition with creditors is exactly the same. This is a discharge by operation of law, instead of by order of court, but an indebtedness thus discharged is a sufficient consideration for a new and express promise to pay the original debt.[4] Of course a new consideration may be given by the creditor, such as his forbearance to foreclose a mortgage for a definite time, and this will likewise support a new promise to pay the original debt or the unsatisfied balance of it.[5] Any provable debt may be thus revived, as, for example, the claim of a surety on a note which was not due at the time of the bankruptcy proceedings.[6] And it is no objection to the enforcement of a promise to pay a debt discharged by bankruptcy that the debtor has selected some one or more creditors to be paid, to the exclusion of others. "The law allows a debtor who has been relieved from his debts by proceedings in bankruptcy to pay such debts, and will enforce a subsequent promise to make such payment, and the bankrupt can elect whether he will pay a part or all of the debts from which he has been thus relieved, he being the sole judge as to the extent to which he will revive such indebtedness." [7]

Subsequent creditors of a bankrupt are not entitled to question his promise to pay a creditor whose claim was barred by a discharge or composition, since the moral obligation is a sufficient consideration. But where a bankrupt, after the approval of a composition, executed a note secured by a mortgage to one of his creditors for the full amount of the debt, subsequent creditors may impeach the obligation as partially without consideration, if the composition creditor had also received a dividend.[8]

Regularly, the new promise should be made directly to the creditor. But there are circumstances in which it may be made to a third person for his benefit. Thus, where a bankrupt executed a written promise, intended to be binding on his executors as well as himself, to pay a

mand or promise. McClintic-Marshall Co. v. City of New Bedford (Mass.) 131 N. E. 444.

[3] Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Succession of Andrieu, 44 La. Ann. 103, 10 South. 388.

[4] Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700; In re Merriman, 44 Conn. 587, Fed. Cas. No. 9,479; Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099.

[5] Stapp v. Thomas, 5 Ky. Law Rep. 603; Thornberry's Adm'r v. Dills, 80 Ky. 241.

[6] Cheney v. Barge, 26 Ill. App. 182.

[7] Thal v. Larmon (C. C.) 25 Fed. 290. Where a bankrupt and a creditor who had obtained a secret preference on a composition ignored it, a new promise by the bankrupt was held enforceable as a moral obligation. Citizens' Nat. Bank v. Kerney, 59 Ind. App. 96, 108 N. E. 139.

[8] Spann v. Read Phosphate Co., 238 Fed. 338, 151 C. C. A. 354, 38 Am. Bankr. Rep. 789.

note which had been released by his discharge, and handed the paper to his son, with directions to deliver it, after his death, to the payee of the note, it was held that the latter, on receipt of the agreement, had a claim against the estate of the decedent, though he had no knowledge of the agreement when it was made.[9] The fact that the promisee had also been adjudged a bankrupt at the time the promise was made does not affect the validity of the promise.[10] But where the partners in a firm had obtained their discharge in bankruptcy, and one of the partners, who had not surrendered a part of his separate property, agreed with a firm creditor to pay his claim, the partner, on paying it, cannot recover from his co-partner unless the latter agreed to pay a moiety of the claim.[11]

§ 759. **To Whom Promise May be Made.**—According to some of the authorities, a new promise to pay a debt discharged by bankruptcy is not enforceable or binding on the debtor unless made either to the creditor personally or to an accredited agent or attorney of his.[12] But other cases favor the rule that such a promise is equally binding and effective when made to a third person,—at least, a person who has some connection with the creditor and may be expected to repeat it to him,—provided it identifies the debt intended with certainty and is definite and unequivocal.[13] And it is beyond any doubt that if the promise is made (whether verbally or in writing) to the creditor's attorney or to an agent authorized to act for him either in the particular matter or in similar matters in general, it may be enforced by the creditor.[14] Thus, where the agent of the holder of a note has the note in his possession, and does not know that a renewal note has been given therefor, a new promise to the agent will remove the bar of the discharge in bankruptcy.[15] In this sense, also, a collector to whom the debt has been committed for collection is the agent of the creditor for the purpose of receiving a new promise to pay it.[16] And the wife of the creditor may act as his agent in such a matter, where the debt grew out of the sale of the wife's land.[17] And the promise may be made to the creditor himself, in such a sense as to satisfy the strictest rule, where it is transmitted to him by a person appointed for that purpose by the debtor.[18]

[9] Hockett v. Jones, 70 Ind. 227.

[10] Swan v. Lullman, 12 Mo. App. 584.

[11] Tyler v. Taylor, 21 Gratt. (Va.) 700.

[12] Prewett v. Caruthers, 12 Smedes & M. (Miss.) 491; Underwood v. Eastman, 18 N. H. 582; Moseley v. Coldwell, 3 Baxt. (Tenn.) 208; Stewart v. Reckless, 24 N. J. Law, 427; Jones v. Talbott, 13 Ky. Law Rep. 303.

[13] Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498; Evans v. Carey, 29 Ala. 99; McKinley v. O'Keson, 5 Pa. St. 369.

[14] Underwood v. Eastman, 18 N. H. 582; Hunt v. Jones, 1 Ind. App. 545, 28 N. E. 98; Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461; Bolton v. King, 105 Pa. St. 78; Hill v. Kendall, 25 Vt. 528.

[15] Jones v. Sennott, 57 Vt. 355.

[16] Relth v. Lullmann, 11 Mo. App. 254.

[17] Jones v. Talbott, 13 Ky. Law Rep. 303.

[18] Hockett v. Jones, 70 Ind. 227.

§ 760. **Time of Making Promise.**—In order that a new promise to pay a debt dischargeable in bankruptcy should overcome the effect of the discharge and found an enforceable obligation, it is necessary that it should have been made after the adjudication in bankruptcy has been passed against the debtor,[19] or at any rate after the filing of the petition in bankruptcy,[20] though it has been held that a letter written by the debtor before the petition in bankruptcy was actually filed, but which, in the ordinary course of the mail, would not reach the creditor until after the adjudication, was a sufficient new promise.[21] But it is not necessary that the bankrupt should wait until after his discharge has been granted in order to bind himself effectually by a new promise. A provable debt may be revived by such a promise made after the filing of the petition and pending the proceedings, and the force of the new obligation is not impaired by the subsequent grant of a discharge.[22] "The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge."[23] But in this case it is necessary that the new promise should show distinctly that the bankrupt undertakes personally to pay the debt, and not to pay it out of his estate in bankruptcy.[24] It may be remarked further that a defense of a

[19] Stebbins v. Sherman, 3 N. Y. Super. Ct. 510. But see Kingston v. Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

[20] Katz v. Moessenger, 7 Ill. App. 536. And see Stern v. Nussbaum, 47 How. Prac. (N. Y.) 489.

[21] Cheney v. Barge, 26 Ill. App. 182.

[22] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493; Old Town Nat. Bank v. Parker, 121 Md. 61, 87 Atl. 1105; Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810, 7 Ann. Cas. 971; Dicks v. Andrews, 132 Ga. 601, 64 S. E. 788; Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808; Wiggin v. Hodgdon, 63 N. H. 39; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338; Fraley v. Kelly, 67 N. C. 78; Hornthal v. McRae, 67 N. C. 21; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Lanagin v. Nowland, 44 Ark. 84; Knapp v. Hoyt, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; Corliss v. Shepherd, 28 Me. 550; Otis v. Gazlin, 31 Me. 567; Wheeler v. Wheeler, 28 Ill. App. 385; Thornberry v. Dils, 3 Ky. Law Rep. 725. But see, per contra, Thornton v. Nichols & Lemon, 119 Ga. 50, 45 S. E. 785; Ogden v. Redd, 13 Bush (Ky.) 581; Graves v. McGuire, 79 Ky. 532; Chapman v. Pennie (Cal.) 39 Pac. 14; Holt v. Akarman (N. J.) 86 Atl. 408; Traders' Nat. Bank v. Hermer, 202 Mo. App. 402, 218 S. W. 937; Bank of Elberton v. Vickery, 20 Ga. App. 96, 92 S. E. 547.

[23] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493.

[24] Hornthal v. McRae, 67 N. C. 21;

discharge in bankruptcy, set up in a pending action, may be waived by the making of a new promise to pay the debt, given after the institution of the suit and before verdict.[25]

§ 761. Sufficiency of New Promise.—While no particular form of words is necessary in order to constitute an effective new promise to pay a debt barred by a discharge in bankruptcy,[26] yet it is required that the new promise shall be clear, distinct, and unequivocal, as well as certain and unambiguous.[27] There must be an express promise to pay the specific debt.[28] "The rule is different in regard to the defense of the statute of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt." [29] In other words, there must be a distinct recognition and renewal of the debt as a binding obligation.[30] In the case of a note, the promise of the debtor to pay it must be clear, distinct, and unequivocal, and without such clear and express promise, neither payment of interest, part payment of the principal, nor a declaration of an intention to pay it, will suffice to revive the note.[31]

Kirkpatrick v. Tattersall, 13 Mees. & W. 760.

[25] Decker v. Kitchen, 33 Hun (N. Y.) 268.

[26] Jones v. Talbott, 13 Ky. Law Rep. 303.

[27] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 851; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Dressler v. Van Vlissingen, 195 Ill. App. 63; Brooks v. Paine, 77 S. W. 190, 25 Ky. Law Rep. 1125; Appeison v. Stewart, 27 Ark. 619; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; Hubbard v. Farrell, 87 Ind. 215; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338; Stern v. Nussbaum, 5 Daly (N. Y.) 382; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Turner v. Chrisman, 20 Ohio, 332; Huffman v. Johns (Pa.) 6 Atl. 205; Murphy v. Crawford, 114 Pa. St. 496, 7 Atl. 142; McDougall v. Page, 55 Vt. 187, 45 Am. Rep. 602; La Tourrette v. Price, 28 Miss. 702; Wheeler v. Simmons, 60 Hun, 404, 15 N. Y. Supp. 462. Where the defendant, some days after obtaining his discharge in bankruptcy, wrote the plaintiff a letter in which he said: "I will send you the first 'V' or 'X' I have," it was held that the expression did not fairly import an absolute promise to pay five or ten dollars, and did not take the plaintiff's debt out of the effect of defendant's discharge. Bigelow v. Norris, 141 Mass. 14, 6 N. E. 88. But on the other hand, a sufficient new promise was made out from the following words, written to a surety on a note given by the bankrupt for borrowed money: "If I live and am prospered, no man who helped me (without remuneration) will be the poorer for me, if not otherwise. That is all there is of it." Cheney v. Barge, 26 Ill. App. 182.

[28] Needham v. Matthewson, 81 Kan. 340, 105 Pac. 436.

[29] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 851.

[30] Meech v. Lamon, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49; Canfield's Appeal, 4 Walk. (Pa.) 457.

[31] Dressler v. Van Vlissingen, 195 Ill. App. 63.

Such statements as the following have been held sufficient: "I am going to pay you every dollar I owe you by the first of July;"[32] "I will pay him some day, can't say when;"[33] "your debt I will pay if I live;"[34] "I will pay the note;"[35] "I will pay the debt before I leave the state;"[36] the creditor "shall have her money, even if it is but a little at a time."[37] But under the rule as above stated, it is not sufficient that the bankrupt acknowledges the debt as still existing, or that he expresses the expectation of paying it or an intention to pay it. The necessary distinct promise to pay cannot be extracted from such expressions as that the debtor is "going" to pay the debt, or that he "expects" to pay it, or that he means to "make it all right," or that he does not intend the creditor shall lose anything.[38] Still less is the rule satisfied by showing merely the recognition by the bankrupt of a moral obligation resting on him,[39] or a willingness to pay the debt, or a statement that he will try to do so.[40] No sufficient new promise is made out by the bankrupt's declaration that "when I am in position to pay, there is no one I would more cheerfully pay,"[41] or "I will make a desperate effort to pay you something on the note,"[42] or "I will do all I can to pay you."[43] Some of the decisions have also held that the promise must be express, and cannot be made out by implication.[44] But it is perhaps better to say that the promise must be so far unqualified as necessarily to authorize the implication of an undertaking to pay the debt.[45] And in any

[32] St. John v. Stephenson, 90 Ill. 82.

[33] Bolton v. King, 105 Pa. St. 78.

[34] Fraley v. Kelly, 79 N. C. 348.

[35] Hunt v. Jones, 1 Ind. App. 545, 28 N. E. 98; Farmers' & Merchants' Bank v. Richards, 119 Mo. App. 18, 95 S. W. 290.

[36] Jones v. Talbott, 13 Ky. Law Rep. 303.

[37] Sundling v. Willey, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644. And see Goldstein v. Saur (Tex. Civ. App.) 162 S. W. 441.

[38] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Dennan v. Gould, 141 Mass. 16, 6 N. E. 22; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49; Meech v. Lamon, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; Willetts v. Cotherson, 3 Ill. App. 644; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; Jones v. Talbott, 13 Ky. Law Rep. 303; Porter v. Porter, 31 Me. 169; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Turner v. Chrisman, 20 Ohio, 332; Yoxthelmer v. Keyser, 11 Pa. St. 364, 51 Am. Dec. 555; Coe v. Rosene, 66 Wash. 73, 118 Pac. 881, 38 L. R. A. (N. S.) 577, Ann. Cas. 1913C, 741; Bartlett v. Peck, 5 La. Ann. 669. But compare Mordaunt v. Monroe, 124 Ill. App. 306; Hubbard v. Farrell, 87 Ind. 215.

[39] Mandell v. Levy, 47 Misc. Rep. 147, 93 N. Y. Supp. 545.

[40] Holden v. Chamberlin (N. D.) 179 N. W. 706.

[41] Kiernan v. Fox, 43 App. Div. 58, 59 N. Y. Supp. 330.

[42] Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810, 7 Ann. Cas. 971.

[43] Holt v. Akarman (N. J.) 86 Atl. 408; Lawrence v. Harrington, 192 N. Y. 408, 25 N. E. 406.

[44] Evans v. Carey, 29 Ala. 99; Willetts v. Cotherson, 3 Ill. App. 644; Katz v. Moessenger, 110 Ill. 372; Porter v. Porter, 31 Me. 169; Stark v. Stinson, 23 N. H. 259; In re Heazelton, 32 Leg. Int. (Pa.) 13; Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498.

[45] Craig v. Seitz, 63 Mich. 347, 30 N. W. 347.

case there must be a clear and certain identification of the particular debt which the bankrupt has in mind and means to revive.[46]

The giving of a new note by the bankrupt, after his discharge, in renewal of a previous note, or simply for the amount of a pre-existing debt, will revive the debt and take it out of the effect of the discharge,[47] but not a mere unfulfilled offer or promise to give a new note.[48] And where the defendant in a pending suit pleads his bankruptcy, but afterwards withdraws the plea and confesses judgment, this will amount to a new promise binding him on the judgment.[49] But the fact that the debtor, after his discharge, states an account running prior to such discharge and fixes a certain balance, and agrees that his debtor may apply certain demands in his favor, does not avoid the effect of the discharge.[50] If there is contradictory evidence as to the making of the alleged new promise, or its terms, or as to the debtor's intention to bind himself to a specific promise to pay the debt, these questions must be left to the jury under proper instructions from the court.[51]

In order to give binding effect to a new promise to pay a debt discharged in bankruptcy, it is necessary that it should have been accepted by the creditor. But where the plaintiff's amended petition in a suit against a discharged bankrupt alleged that the defendant "promised and agreed to and with the plaintiff" to pay the barred debt as soon as he was able, it sufficiently alleged that the plaintiff had accepted the new promise.[52] So, evidence of a continued effort by a creditor of a discharged bankrupt to enforce the latter's promise to pay the barred debt, and to get the bankrupt to keep his promise, sufficiently shows an acceptance of the promise by the creditor.[53] If a discharged bankrupt's new promise to pay a barred debt was induced by the fraud of the creditor, the latter cannot recover upon it. But if the defendant bankrupt, in promising plaintiff to pay the barred debt, did not un-

[46] Landis v. Roth, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747; Hobough v. Murphy, 114 Pa. St. 358, 7 Atl. 139. A written promise to pay a debt discharged in bankruptcy need not describe the debt where there is only one debt due to that creditor. Goldstein v. Saur (Tex. Civ. App.) 162 S. W. 441.

[47] Christie v. Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Bown v. Thompson, 34 Leg. Int. (Pa.) 305; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Greil v. Durr, 203 Ala. 644, 84 South. 743; Stokes v. Sanders, 181 App. Div. 249, 168 N. Y. Supp. 409.

[48] Porter v. Porter, 31 Me. 169; Stern v. Bradner Smith & Co., 127 Ill. App. 640.

[49] Anderson v. Clark, 70 Ga. 362; Dewey v. Moyer, 72 N. Y. 70.

[50] Warren v. Bishop, 22 Vt. 607; In re Heazelton, 1 Wkly. Notes Cas. (Pa.) 67.

[51] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808; Pratt v. Russell, 7 Cush. (Mass.) 462; Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461; Tioga County Savings & Trust Co. v. Gates, 254 Pa. 298, 98 Atl. 968.

[52] Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[53] Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

derstand that the new promise would be binding upon him, that is, if he was mistaken as to its legal import and effect, the mistake was not such a mistake of law as would warrant equitable relief, either affirmative or defensive.[54]

§ 762. **Same; Part Payment.**—Neither a payment of interest nor a part payment of the principal will suffice to revive a debt from which the debtor has been released by a discharge in bankruptcy or constitute a new promise to pay it.[55] "A different rule prevails in case of a debt discharged in bankruptcy from that applied to the defense of the statute of limitations. In the latter case payment of a part of the debt is regarded as an acknowledgment of the existence of the debt, and the law implies a promise to pay the residue. But in the case of a debt discharged in bankruptcy, a promise cannot be inferred, but must be express, and so all the cases agree that partial payments will not revive the debt."[56] However, where there is a distinct and unambiguous promise, together with a partial payment, it fully and in every particular complies with the rule for the revival of a discharged debt.[57] But no such promise can be made out from the fact that the debtor, in authorizing the creditor to draw on him for part of the original debt, said that he "hoped" to pay the balance in full.[58] But the fact of part payment is admissible to identify the debt in reference to which an express promise to pay, otherwise of uncertain application, may be proved.[59]

§ 763. **Same; Written or Oral Promise.**—In Maine, Massachusetts, and New York (and perhaps in some other states) the statutes provide that no agreement or promise to revive a debt barred by a discharge in bankruptcy shall be binding and effective unless contained in some writing signed by the party to be charged.[60] Since the bankruptcy law

[54] Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[55] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Meyer v. Bartels, 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Wilson v. Chandler, 133 Ill. App. 622; Jacobs v. Carpenter, 161 Mass. 16, 36 N. E. 676; Helm v. Chapman, 171 Mass. 347, 50 N. E. 529; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Stark v. Stinson, 23 N. H. 259; Wheeler v. Simmons, 60 Hun, 404, 15 N. Y. Supp. 462; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Viele v. Ogilvie, 2 G. Greene (Iowa) 326; Tolle v. Smith, 98 Ky. 464, 33 S. W. 410. But see Warder v. Lake, 198 Ill. App. 514.

[56] Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406.

[57] Huffman v. Johns (Pa.) 6 Atl. 205; Lawrence v. Harrington, 48 Hun, 618, 1 N. Y. Supp. 577.

[58] Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869.

[59] Willetts v. Cotherson, 3 Ill. App. 644.

[60] See Spooner v. Russell, 30 Me. 454; Otis v. Gazlin, 31 Me. 567; Kingley v. Cousins, 47 Me. 91; Nathan v. Leland, 193 Mass. 576, 79 N. E. 793; Jacobs v. Carpenter, 161 Mass. 16, 36 N. E. 676; Elwell v. Cumner, 136 Mass. 102; Bair

contains no provision on this subject, and since state statutes of this character do not purport to affect the debt itself, but only the remedy for its enforcement, they are not in contravention of the federal law, and are effective in the jurisdictions where they are in force. But according to what may be called the common or general law of the subject, and apart from such statutory provisions, it does not need a written promise to revive a discharged debt, but one merely spoken will be sufficient for the purpose if distinct and positive.[61]

§ 764. Conditional Promise.—It is not necessary that a new promise to pay a debt barred by a discharge in bankruptcy should be absolute, but it may be made upon a condition or coupled with a condition.[62] But in that case, where the condition is in the nature of a proposition offered to the creditor, it must be alleged and shown that he accepted it or assented to it,[63] and if the creditor expressly declines to agree to the condition, and insists on the immediate and unconditional payment of his claim, the debt is not revived and no action can be maintained on it.[64] Generally, however, a condition accepted by the creditor will not at all impair the effect of the agreement in reviving the debt, as, for example, where the bankrupt undertakes to pay the debt if time is granted to him for the purpose and it is accordingly granted,[65] or where the bankrupt promises to pay the debt in full if the creditor will pay the taxes for a year on certain property, which is done.[66] But here it must be observed that the condition must contain nothing unlawful or in contravention of the bankruptcy act. Thus, a promise to pay a particular creditor in full if he will refrain from opposing the bankrupt's

v. Hilbert, 84 App. Div. 621, 82 N. Y. Supp. 1010; Meyer v. Bartels, 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Gruenberg v. Treanor, 40 Misc. Rep. 232, 81 N. Y. Supp. 675; Mandell v. Levy, 47 Misc. Rep. 147, 93 N. Y. Supp. 545; Polk v. Stephens, 118 Ark. 438, 176 S. W. 689.

[61] Mutual Reserve Fund Life Ass'n v. Beatty, 93 Fed. 747, 35 C. C. A. 573, 2 Am. Bankr. Rep. 244; Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; Farmers' & Merchants' Bank v. Richards, 119 Mo. App. 18, 95 S. W. 290; Blanc v. Banks, 10 Rob. (La.) 115, 43 Am. Dec. 175; Worthington v. De Bardlekin, 33 Ark. 651; Ross v. Jordan, 62 Ga. 298; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Henley v. Lanier, 75 N. C. 172, 15 N. B. R. 280; Kull v. Farmer, 78 N. C. 339; Lanier v. Tolleson, 20 S. C. 57; Farmers' & Mechanics' Bank v. Flint, 17 Vt. 508, 44 Am. Dec. 351; Barron v. Benedict, 44 Vt. 518; Holden v. Chamberlin (N. D.) 179 N. W. 706; Vachon v. Ditz (Wash.) 194 Pac. 545.

[62] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Knapp v. Hoyt, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700. A promise by the bankrupt to make a payment on a barred indebtedness out of particular funds if they proved sufficient for the purpose after the payment of other obligations, does not give rise to a general liability on the part of the bankrupt. Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[63] Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87.

[64] International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87.

[65] Comfort v. Eisenbeis, 11 Pa. St. 13.

[66] Thornberry v. Dils, 80 Ky. 241.

application for a discharge, or if he will dismiss a proceeding to set aside the discharge, is fraudulent and void.[67]

If the condition was not in the nature of an election offered to the creditor, but contained something personal to the bankrupt, or involved the occurrence of a future event or the future existence of a certain state of affairs, then it must be pleaded and shown that the condition has been fulfilled or, as the case may be, that the event has happened or that the contemplated state of affairs now exists.[68] Thus, if the bankrupt promises to pay the debt after the lapse of a certain time, no action can be maintained on the debt or the new promise until such time has elapsed.[69] Generally, however, it is held that the bankrupt's undertaking to pay the debt when he completes a certain contract, when he collects certain claims due to him, when he returns from a contemplated journey, or the like, does not make the promise a conditional one, but is rather to be regarded as a specification of the time for payment.[70] Where the bankrupt's promise is that, if he had not paid a certain debt, contracted before the bankruptcy, he would pay it, the creditor has only to prove that the debt has not been paid, and then the promise becomes absolute.[71] So a promise that, if the creditor should lose a certain case then pending in the appellate court, the bankrupt would make it good to him, becomes enforceable upon the determination of the appeal adversely to the creditor.[72] A promise to do certain work and apply it on a debt discharged by bankruptcy cannot be construed into a promise to pay the debt in any other way.[73] It must also be remarked that if there is any indefiniteness or ambiguity in the statement of the condition, it must be effectually cleared up before the creditor can recover. Thus, a promise to pay "as soon as I get through with that squaring up" is not sufficient to revive the debt unless it is shown exactly what was meant by the "squaring up."[74] Finally, a condition attached to the promise may be waived by the bankrupt, and will be considered as having been

[67] Tirrell v. Freeman, 139 Mass. 297, 1 N. E. 350; Fell v. Cook, 44 Iowa, 485.

[68] Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Apperson v. Stewart, 27 Ark. 619; Tolle v. Smith, 98 Ky. 464, 33 S. W. 410; Yate v. Hollingsworth, 5 Har. & J. (Md.) 216; La Tourrette v. Price, 28 Miss. 702; Goldman v. Abrahams, 9 Daly (N. Y.) 223; Lanier v. Tolleson, 20 S. C. 57; Sherman v. Hobart, 26 Vt. 60; Dearing v. Moffit, 6 Ala. 776; Richardson v. Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; Dantzler v. Scheuer, 203 Ala. 89, 82 South. 103.

[69] Arnold v. Elliott, 7 Humph. (Tenn.) 354.

[70] Eaton v. Yarborough, 19 Ga. 82; Swan v. Lullman, 12 Mo. App. 584. A promise to pay "as soon as possible," made after a discharge in bankruptcy, is not a conditional promise. Sundling v. Willey, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644.

[71] Hill v. Kendall, 25 Vt. 528.

[72] Herndon v. Givens, 16 Ala. 261.

[73] Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406.

[74] Stern v. Nussbaum, 5 Daly (N. Y.) 382.

waived by his making payments on the debts prior to the happening of the condition.[75]

§ 765. **Promise to Pay When Able.**—A promise by a discharged bankrupt to pay an antecedent debt as soon as he is able (or as soon as he can, or as soon as he has the money, or the like), though it is a conditional promise, is not void for uncertainty, but is capable of enforcement by suit.[76] But the creditor, in order to recover on such a promise, must both plead and prove that the debtor is presently able to pay the debt.[77] It is, however, no ground of demurrer to the declaration in such a suit that it does not state in what the defendant's ability to pay consists.[78] To sustain the burden of proving the debtor's ability to pay, the creditor must show his present possession of sufficient and available means. Proof of his ability to borrow the money is not sufficient.[79] Further, the defendant is entitled to show what portion of his earnings it is necessary for him to use for the support of himself and his family, and if the residue is insufficient to pay the debt, ability to pay is not shown,[80] and the law does not require the debtor to reduce his family expenditures to such a point that enough will remain to satisfy the creditor.[81] And a promise to pay a debt when able must be construed as an undertaking to pay out of the first surplus money which the debtor may acquire, and there is no such surplus until he satisfies the claims of those who have extended him credit on the faith of his immunity from the burden of debts barred by his discharge. In other words, though the plaintiff may show that the defendant has sufficient property to pay the debt in suit, yet he cannot recover if it is shown that the payment of other just claims, contracted since his discharge in bank-

[75] Thompkins v. Hazen, 30 App. Div. 359, 51 N. Y. Supp. 1003. But see this case on appeal, 165 N. Y. 18, 58 N. E. 762.

[76] Krause v. Torry, 146 Ala. 548, 40 South. 956; Torry v. Krauss, 149 Ala. 200, 43 South. 184; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Eckler v. Galbraith, 12 Bush (Ky.) 71; Brashears v. Combs, 174 Ky. 344, 192 S. W. 482; Holden v. Chamberlin (N. D.) 179 N. W. 706. A promise by the bankrupt to pay his notes at maturity if he is then able to do so, and if not able, then to pay them when he can do so, the time being extended for that purpose, is a valid promise. Dantzler v. Scheuer, 203 Ala. 89, 82 South. 103. Compare Bigelow v. Morris, 139 Mass. 12, 29 N. E. 61; Elwell v. Cumner, 136 Mass. 102. And see Caledonian Coal Co. v. Young, 22 N. M. 675, 167 Pac. 274, holding that a statement of a discharged bankrupt to a creditor that he would pay his account and all his other creditors "if able" did not amount to a promise, conditional or otherwise, and did not revive the debt.

[77] Patten v. Ellingwood, 32 Me. 163; Green v. McGowan, 7 Ky. Law Rep. 661; Taylor v. Nixon, 4 Sneed (Tenn.) 352; Stern v. Gerber, 137 N. Y. Supp. 879; Torry v. Krauss, 149 Ala. 200, 43 South. 184; Mason v. Hughart, 9 B. Mon. (Ky.) 480.

[78] Horner v. Speed, 2 Pat. & H. (Va.) 616.

[79] Kraus v. Torry, 146 Ala. 548, 40 South. 956.

[80] Kraus v. Torry, 146 Ala. 548, 40 South. 956.

[81] Torry v. Krauss, 149 Ala. 200, 43 South. 184.

ruptcy, would exhaust his estate and leave nothing for the plaintiff.[82] On the other hand, if the bankrupt, at the very time of making the promise, has sufficient means to discharge his outstanding new debts and also to satisfy the plaintiff, there seems to be no reason why the creditor should not immediately begin his suit. But the authorities appear to hold that a promise clearly relating to financial ability at some future time will not sustain an immediate action.[83]

§ 766. Remedies of Creditor.—Where the new promise is made after the adjudication in bankruptcy, but before the end of the proceedings, the creditor cannot prove a claim on it in the bankruptcy,[84] nor sue on it until after the question of the bankrupt's discharge has been determined.[85] But on the other hand, the fact that the creditor has proved the original debt in the bankruptcy proceedings, and received a dividend, does not prevent him from recovering the balance in an action on the new promise.[86] And an express promise to pay part of a debt, discharged by the proceedings in bankruptcy, will revive the debt pro tanto.[87] But the original debt is revived only as of the date of the new promise, and where judgment is obtained upon the latter, the debtor is entitled to claim the exemption provided by law in force at the latter date.[88] But where he has agreed that work done by him for the creditor shall go towards the payment of the discharged debt, this constitutes a new promise to pay the debt, and he cannot maintain an action to recover the value of such work.[89] The creditor may also recover interest on the original debt as well as the principal of it, where the bankrupt promised full payment, as the promise revives the debt on the original consideration.[90] But where the debt had been reduced to judgment, it is so far extinguished by the discharge in bankruptcy that the new promise to pay will not authorize the creditor at once to issue execution and sell the debtor's land, but he must first revive the judgment.[91] Nor can he arrest the debtor and hold him to bail.[92] But where the original debt is in such form as to be capable of assignment to a third person, the creditor may assign the new promise with it, and so enable the assignee to sue on it.[93]

[82] Eckler v. Galbraith, 12 Bush (Ky.) 71.

[83] Samuel v. Cravens, 10 Ark. 380.

[84] Kingston v. Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

[85] Egbert v. McMichael, 9 B. Mon. (Ky.) 44.

[86] Kingston v. Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

[87] Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729.

[88] Willis v. Cushman, 115 Ind. 100, 17 N. E. 168.

[89] Sampson v. Curtis, 39 Me. 398.

[90] Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151.

[91] Graham v. Dreutzer, 75 Wis. 558, 44 N. W. 776, 17 Am. St. Rep. 205.

[92] Glazier v. Stafford, 4 Har. (Del.) 240.

[93] Way v. Sperry, 6 Cush. (Mass.) 238,

As to the form of action for the recovery of a debt or claim thus revived, there has been much difference of opinion. Numerous cases hold that when the bankrupt has given a new promise sufficient to revive a debt barred by his discharge, the creditor, in bringing suit for the recovery of the debt, must declare on the original obligation or engagement, and not on the new promise.[94] But the opposite view, namely, that the original debt is extinguished by the discharge, and the only cause of action is on the new promise, is supported by several decisions of weight.[95] Probably, however, the better reason as well as the preponderance of authority is with the decisions which leave it to the election of the creditor which course he will pursue, it being equally competent to him to sue directly on the new promise or to declare on the original debt and then plead the new promise in replication to the defendant's plea of his discharge in bankruptcy.[96]

§ 767. Burden of Proof and Evidence.—The burden rests on the plaintiff in an action, to prove a new promise to pay a debt released by the defendant's discharge in bankruptcy, and this fact he must establish by clear and satisfactory evidence.[97] Also the proof must correspond with the allegations of his declaration or complaint. Thus, if he alleges an unconditional promise of the defendant to pay, made after the latter's discharge, proof of a conditional promise will not authorize a

52 Am. Dec. 779; Underwood v. Eastman, 18 N. H. 582; Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729; Clark v. Atkinson, 2 E. D. Smith (N. Y.) 112; Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809. But compare White v. Cushing, 30 Me. 267; Wardwell v. Foster, 31 Me. 558; Moore v. Viele, 4 Wend. (N. Y.) 420; Walbridge v. Harroon, 18 Vt. 448.

[94] Bush v. Stanley, 122 Ill. 406, 13 N. E. 249; Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700; Gruenberg v. Treanor, 40 Misc. Rep. 232, 81 N. Y. Supp. 675; Turner v. Chrisman, 20 Ohio, 332; Marshall v. Tracy, 74 Ill. 379; Apperson v. Stewart, 27 Ark. 619; Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729; Fraley v. Kelly, 67 N. C. 78; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543.

[95] Trueman v. Fenton, 2 Cowp. 544; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Murphy v. Crawford, 114 Pa. St. 496, 7 Atl. 142; Hobough v. Murphy, 114 Pa. St. 358, 7 Atl. 139; Bolton v. King, 105 Pa. St. 78; Reeside v. Hadden, 12 Pa. St. 243; Field's Estate, 2 Rawle (Pa.) 351, 21 Am. Dec. 454; Chabot v. Tucker, 39 Cal. 434; Ross v. Jordan, 62 Ga. 298; Fleming v. Lullman, 11 Mo. App. 104; Eckler v. Galbraith, 12 Bush (Ky.) 71.

[96] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Torry v. Krauss, 149 Ala. 200, 43 South. 184; Horner v. Speed, 2 Pat. & H. (Va.) 616; Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Nowland v. Lanagan, 45 Ark. 108; Classen v. Schoenemann, 80 Ill. 304, 16 N. B. R. 98; Turner v. Chrisman, 20 Ohio, 332; Hubbard v. Farrell, 87 Ind. 215; Spooner v. Russell, 30 Me. 454; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347.

[97] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808; Brooks v. Paine, 77 S. W. 190, 25 Ky. Law Rep. 1125; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729; Spaulding v. Vincent, 24 Vt. 501; Haines v. Stauffer, 13 Pa. St. 541, 53 Am. Dec. 493; Dye v. Bertram, 6 Am. Law Rep. 355; Atwood v. Gillett, 2 Doug. (Mich.) 206; Underwood v. First Nat. Bank (Tex. Civ. App.) 185 S. W. 395; Holden v. Chamberlin (N. D.) 179 N. W. 706.

recovery.[98] On any doubtful or conflicting testimony, the question whether a new promise was or was not made must go to the jury.[99] But the possibility of wrong to a discharged bankrupt by perjured testimony as to a new promise, thereby depriving him of the benefit of his discharge, is not to be remedied by a forced interpretation of the evidence in support of the promise to pay.[100] If there is any doubt or ambiguity as to the debt to which the new promise was meant to apply, the plaintiff must identify it by strong and positive proof.[101] If the original debt was evidenced by a promissory note, the note itself may be given in evidence to show the consideration for the new promise.[102]

[98] Buford v. Crigler, 7 Ky. Law Rep. 662; Doom v. Snyder, 10 Ky. Law Rep. 281.

[99] Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498; United Society in Canterbury v. Winkley, 7 Gray (Mass.) 460; Old Town Nat. Bank v. Parker, 121 Md. 61, 87 Atl. 1105; Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[100] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808.

[101] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808.

[102] Egbert v. McMichael, 9 B. Mon. (Ky.) 44.

CHAPTER XXXVI

COSTS AND FEES

§ 768. Deposit of Filing Fees.—Upon the filing of a petition in bankruptcy, the law requires the clerk of the court to collect filing fees, to the extent of $15 for the referee, $5 for the trustee, and $10 for himself. These fees are to be deposited by the petitioning creditors in involuntary cases, and by the bankrupt in voluntary cases, except where he is excused on the ground of poverty.[1] This deposit, on the part of a voluntary bankrupt not so excused, is a condition precedent to the filing of the petition; but if the petition is placed on file and an adjudication made without payment of the fees, the objection may be raised on the bankrupt's application for discharge, and action on such application will be stayed until the filing fees are paid.[2] When the petition of a proposed voluntary bankrupt is accompanied by an affidavit stating that he has not and cannot obtain the money with which to pay the filing fees, the clerk will file the petition and docket the case without exacting the deposit of such fees.[3] But the question of the petitioner's ability to pay the fees is open to investigation at future stages of the proceedings. And while his affidavit of inability is prima facie evidence of the facts stated,[4]

[1] Bankruptcy Act 1898, §§ 40, 48, 51, 52. And see, supra, § 165.

[2] In re Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31.

[3] In re Fees Payable by Voluntary Bankrupts, 95 Fed. 120. Since, under the statute, payment of the clerk's filing fees has priority over payment of attorneys' fees, a bankrupt cannot reverse this order, and, after paying his attorney a fee, file his petition and schedules as a pauper. In re Darr (D. C.) 232 Fed. 415, 36 Am. Bankr. Rep. 432.

[4] In re Levy (D. C.) 101 Fed. 247.

it is not conclusive, and if circumstances appear casting doubt on the truth of the affidavit, the case may be sent to the referee to investigate and report the facts,[5] and then the petitioner must support his allegation of poverty by convincing evidence.[6] As to the fact of his actual inability to procure the money with which to pay the fees, he is not required to solicit gifts or loans from his friends for that purpose, and he is not guilty of a false oath in making affidavit that he "cannot obtain" the requisite sum, although it appears that friends would have advanced him the amount if requested.[7] But he cannot hold out property which is exempt under the laws of the state and still make the poverty affidavit. The provision of the bankruptcy act giving bankrupts the benefit of exemptions allowed by state law was not intended to exonerate them from payment of the filing fees on their voluntary petitions. Such a bankrupt is excused from payment of the fees only in case of absolute inability to pay them; and such inability does not exist so long as he has money or property sufficient for the purpose, although it is exempt.[8] Further, in case of the filing of a petition by a voluntary bankrupt without payment of the fees, "the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed."[9] This clearly means that the bankrupt may be required to pay the filing fees out of money acquired or earned since the filing of the petition, though the only decision on the point is to the contrary.[10] It is to be observed that the referee has no authority to make such an order, the power being confided to the judge alone.[11]

Upon the voluntary application of a partnership for the benefit of the act, only one petition need be filed, and all that is done thereupon constitutes one proceeding, although it involves granting a discharge to

[5] In re Collier, 93 Fed. 191, 1 Am. Bankr. Rep. 182.

[6] In re Williams, 2 Nat. Bankr. News, 206.

[7] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; In re Mason, 181 Fed. 899, 25 Am. Bankr. Rep. 73. But compare In re Hines, 117 Fed. 790, 9 Am. Bankr. Rep. 27. Where persons filing voluntary petitions in bankruptcy were able to pay their attorneys, and were earning money, and by proper saving and conduct could accumulate and procure the money with which to pay the filing fee and referee's fee, they will not be permitted to maintain the proceedings without such payment. In re Latham (D. C.) 271 Fed. 538, 46 Am. Bankr. Rep. 581.

[8] In re Mason, 181 Fed. 899, 25 Am. Bankr. Rep. 73; In re Hines, 117 Fed. 790, 9 Am. Bankr. Rep. 27; In re Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53; In re Collier, 93 Fed. 191, 1 Am. Bankr. Rep. 182. Contra, see Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[9] General Orders in Bankruptcy, No. 35.

[10] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[11] In re Plimpton, 103 Fed. 775, 4 Am. Bankr. Rep. 614.

each of the partners, and only one deposit of the filing fee is required; it cannot be demanded of the partners, as a prerequisite to discharging them, that they should each separately deposit a like fee.[12] But where a partnership files a voluntary petition for the adjudication in bankruptcy of the firm as such, and also separate petitions for the adjudication of the several partners, each petition, with the accompanying schedules, constitutes a separate and distinct "case," within the meaning of the statute, and a deposit of the statutory filing fees must be made, not only for the partnership, but also for each member of the firm who seeks an adjudication.[13]

When the filing fees are deposited by the petitioning creditors in an involuntary case, or by their attorneys for them, they are entitled to have the amount refunded to them out of the estate in bankruptcy.[14]

§ 769. **Security for Costs.**—When a trustee in bankruptcy is urged by certain creditors to institute proceedings to set aside fraudulent conveyances or preferences, or otherwise to take action in court for the recovery of alleged assets of the estate, he may require those creditors to furnish him security or indemnity against the costs which may fall upon the estate in consequence of his compliance with their demands.[15] It is also provided by the general orders in bankruptcy that the clerk, the marshal, or the referee, before incurring expenses of certain kinds, may require the bankrupt or other person in whose behalf the duty is to be performed to furnish indemnity for such expenses, and that money advanced by the bankrupt or other person for this purpose shall be repaid him out of the estate. (General Order No. 10.) Thus, a petitioner in voluntary bankruptcy may be required to furnish indemnity to the referee for the cost of publishing the notice to creditors and the creditors' meeting, and if he fails to do so, without excuse, in time for the meeting to be held, his petition should be dismissed for want of prosecution.[16] But this provision does not apply to one against whom a petition in involuntary bankruptcy is filed and who denies insolvency and resists adjudication, and he cannot be required to deposit the cost of a reference and hearing.[17] And the statutes and rules as to security for

[12] In re Langslow, 98 Fed. 869, 1 Am. Bankr. Rep. 258; In re Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529. But compare In re Farley, 115 Fed. 359, 8 Am. Bankr. Rep. 266.

[13] In re Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31.

[14] In re Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re J. W. Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

[15] Supra, § 283. On the other hand, a trustee in bankruptcy bringing a suit in a state court, who has no assets in his hands except the claim sued on, and does not show any prospect of being able to succeed in the action, may and should be required to file security for costs. Uhr v. Coulter, 172 App. Div. 413, 158 N. Y. Supp. 512.

[16] In re Crisp (D. C.) 239 Fed. 419, 38 Am. Bankr. Rep. 557.

[17] In re Wester, 242 Fed. 465, 155 C. C. A. 241, 40 Am. Bankr. Rep. 89.

costs do not apply to petitions to review bankruptcy proceedings in matters of law, and there is no settled practice authorizing an application for security in such cases.[18] The provision as to repayment out of the estate of money advanced to cover costs does not apply to the filing fees which the clerk is directed to collect on the filing of a voluntary petition in bankruptcy, and this money is not to be returned to the bankrupt.[19] A creditor who objects to the bankrupt's application for discharge may prosecute his objections in forma pauperis, by virtue of the Act of Congress of July 20, 1892, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706), which gives any citizen entitled to commence "any suit or action in any court of the United States" such right on making the required showing.[20]

§ 770. **Power to Award Costs.**—Under the provisions of the statute, the court of bankruptcy may "tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."[21] But the obvious policy of the act, manifest in all of its provisions touching on the subject, is to reduce to a minimum the expense of administering estates, and the courts are bound to give the statute such a construction and application as will fulfill the intention of Congress in this regard.[22] The general orders also provide that, "in cases of involuntary bankruptcy, where the debtor resists adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."[23] But as regards the case where the petition is dismissed, it is held that this applies only in cases where the jurisdiction of the court was not questioned, or was sustained, and the decision was on the merits, and not to cases where the petition was dismissed for want of jurisdiction or because the defendant was not within

[18] In re Vidal, 230 Fed. 603, 145 C. C. A. 13, 35 Am. Bankr. Rep. 806.

[19] In re Matthews (D. C.) 97 Fed. 772, 3 Am. Bankr. Rep. 265; Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457.

[20] In re Guilbert, 154 Fed. 676, 18 Am. Bankr. Rep. 830.

[21] Bankruptcy Act 1898, § 2, cl. 18. A state court cannot review a judgment of a federal court allowing costs in bankruptcy proceedings. Thompson v. Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89.

[22] In re J. W. Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Fullick, 201 Fed. 463, 28 Am. Bankr. Rep. 634.

[23] General Orders in Bankruptcy, No. 34. And see In re Ghiglione, 93 Fed. 186, 1 Am. Bankr. Rep. 580; In re Morris, 115 Fed. 591, 7 Am. Bankr. Rep. 709; In re Reiswig (D. C.) 253 Fed. 390, 42 Am. Bankr. Rep. 161. Bankruptcy Act, § 2, subd. 18, and General Order No. 34 should be read together and are merely declaratory of the general power of courts of equity, including bankruptcy courts, over the allowance and apportionment of costs. Petition of Kurtz Brass Bed Co., 250 Fed. 116. Upon the dismis-

the classes of persons or corporations made subject to the law.[24] Another clause of the act provides that, when a petition in involuntary bankruptcy is accompanied by an application to seize and hold the property of the alleged bankrupt prior to the adjudication, the petitioners shall file a bond conditioned for the payment, in case the petition is dismissed, of costs, expenses, and damages, and if the petition is dismissed, the respondent shall be allowed costs, counsel fees, expenses, and damages occasioned, to be fixed by the court and paid by the obligors in the bond.[25] But it is held that this applies only to the one case specified, so that, upon the dismissal of a petition in bankruptcy, the respondent is entitled to costs, but not to an allowance for counsel fees or expenses or damages, unless there was an application to seize and hold his property,[26] and the fact that a temporary injunction was granted to restrain supposed debtors from paying money into the hands of the alleged bankrupt does not bring the case within the provision in question.[27] But the court of bankruptcy has authority under its general equity powers to order the petitioning creditors to pay the expenses of a receivership, where the receiver was appointed on their application on the filing of their petition, which petition was subsequently dismissed as unfounded,[28]

sal of an involuntary petition, the court has no inherent power to assess the compensation of the trustee and counsel against the petitioning creditors in the absence of fraud or bad faith. In re National Carbon Co., 241 Fed. 330, 154 C. C. A. 210, 39 Bankr. Rep. 218. On dismissal of a proceeding in involuntary bankruptcy, the respondent is not entitled to have an allowance for counsel fees taxed in his bill of costs, even though the proceeding was not instituted in good faith. In re Shon (D. C.) 212 Fed. 797.

[24] In re Philadelphia & Lewes Transp. Co. (D. C.) 127 Fed. 896, 11 Am. Bankr. Rep. 444.

[25] Upon the dismissal of a petition in involuntary bankruptcy, on which a receiver was appointed, the court of bankruptcy has jurisdiction to authorize the allowance of damages, etc., in accordance with Bankruptcy Act, § 3e, occasioned by the appointment of the receiver. In re Weissbord (D. C.) 241 Fed. 516, 39 Am. Bankr. Rep. 243. But see In re Wise (D. C.) 212 Fed. 567, holding that, since the counsel fees, expenses, and damages provided for in that section of the Act are for special services or for damages occasioned by the wrongful taking of the property of an alleged bankrupt, such fees and damages are not taxable in the bankruptcy proceedings, but are recoverable in a suit on the bond of the petitioners. Where an alleged bankrupt corporation, on the filing of an involuntary petition against it, consented to the appointment of a receiver without the bond required by the Act having been given, it cannot, on the dismissal of the petition, object to the payment of necessary disbursements out of the funds in the receiver's custody. In re Independent Machine & Tool Corp., 251 Fed. 484, 163 C. C. A. 478, 41 Am. Bankr. Rep. 517.

[26] In re Williams, 120 Fed. 34, 9 Am. Bankr. Rep. 736; In re Morris, 115 Fed. 591, 7 Am. Bankr. Rep. 709; In re Ghiglione, 93 Fed. 186, 1 Am. Bankr. Rep. 580.

[27] In re Williams, 120 Fed. 34, 9 Am. Bankr. Rep. 736.

[28] In re Lacov, 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290. See In re Eagle Steam Laundry Co., 184 Fed. 949, 25 Am. Bankr. Rep. 868. An accounting of the receipts and disbursements of a receiver appointed by a state court at the instance of a trustee in bankruptcy, and to protect property sued for by him, involves fixing his compensation, so far as such court can fix it. Hull v. Fifty-Second St. Storage House, 167 App. Div. 860, 153 N. Y. Supp. 850.

and to enforce such an order by proceedings in contempt.[29] But if the receiver has continued in the possession of the property until after the defendant has been adjudged bankrupt by the court in another district, the authority to compensate the receiver passes to the court making the adjudication, which takes exclusive jurisdiction of the estate.[30] Where creditors successfully oppose the bankrupt's application for discharge, and incur costs and expenses in so doing, they would ordinarily be taxable against the bankrupt. But if he is entirely without money, the court will not make a useless order upon him to pay such costs, and there is no warrant of law to tax such costs against the estate.[31]

§ 771. **Amount and Items of Costs.**—Fees of witnesses in bankruptcy proceedings are a part of the costs which may properly be taxed by the court, and their allowance is indirectly provided for in the clause which declares that "no person shall be required to attend as a witness before the referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him."[32] It is also provided that the bankrupt "shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence."[33] But extra compensation to expert witnesses, above the statutory witness fee and mileage, cannot be taxed as costs, or allowed against a losing party, in a court of bankruptcy; and the court will not be bound to make such an allowance because counsel have so agreed, especially where the agreement is not in writing.[34] As to the expense of taking down and preserving testimony, it is held that, except where a stenographer is employed on application of the trustee, as provided by section 38, clause 5, of the bankruptcy act, or there has been a stipulation of the parties, or money has been deposited for the expense as provided by general order No. 10, the referee cannot be allowed for the expense of a stenographer.[35] And in any event, the compensation allowed to stenographers will be scrutinized by the court, and reduced if deemed excessive.[36] As to costs on appeal, where proceedings for review of an order of the court of bankruptcy are dismissed for want of jurisdiction, without any motion therefor, neither party will be allowed costs.[37] And

[29] In re Lacov, 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290.

[30] In re Sears, Humbert & Co., 128 Fed. 275, 62 C. C. A. 623.

[31] In re Kyte, 189 Fed. 531, 26 Am. Bankr. Rep. 507.

[32] Bankruptcy Act 1898, § 41, proviso. And see, supra, § 273.

[33] Bankruptcy Act 1898, § 7, proviso.

[34] In re Carolina Cooperage Co, 96 Fed. 604.

[35] In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651. And see supra, §§ 266, 273.

[36] In re Ellett Electric Co., 196 Fed. 400, 28 Am. Bankr. Rep. 453.

[37] Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159, 8 Am. Bankr. Rep. 20.

the same rule applies where, on appeal against a trustee from an order in bankruptcy, such order is reversed on a ground not assigned or urged by the appellant.[38] And though a decree in bankruptcy is reversed on review in the Circuit Court of Appeals, no costs should be allowed when the petition for review was delayed nearly six months, and the estate has probably deteriorated through the delay, and where further proceedings are necessary.[39] But where an appeal is taken from an order overruling respondent's demurrer to a bill of complaint brought by the trustee in bankruptcy, and pending the appeal the bill is voluntarily dismissed by the complainant, on leave of court, without prejudice, and at his own cost, thereby making necessary the dismissal of the appeal, he should be required to pay the costs on appeal.[40]

§ 772. **Persons Entitled to Costs.**—Where a petition for adjudication in involuntary bankruptcy is contested, costs will be awarded to the successful party, that is, to the alleged bankrupt if he defeats the petition, to the petitioning creditors if the adjudication is made.[41] But the present statute and orders do not contemplate an allowance of expenses or counsel fees to a person who is adjudged bankrupt after an unsuccessful resistance to the petition.[42] The bankrupt, however, is entitled to his disbursements in proceedings to obtain his discharge,[43] and if he advances the money necessary to pay for the issuance and publication of notices of his application for discharge, he is entitled to repayment of the same out of the estate.[44] So, in a proceeding to revoke or annul the discharge of a bankrupt, costs may be awarded to the prevailing party.[45] The trustee in bankruptcy is likewise entitled to costs on bringing to a successful conclusion an action to recover assets of the bankrupt, set aside an unlawful assignment or transfer of his property, avoid a fraudulent conveyance, or recover an illegal preference.[46] But claimants having claims against the estates of bankrupts must ordinarily establish them

See Gandia & Stubbe v. Cadierno, 233 Fed. 739, 147 C. C. A. 505, 36 Am. Bankr. Rep. 789.

[38] In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186.

[39] In re Endlar, 192 Fed. 762, 113 C. C. A. 48, 27 Am. Bankr. Rep. 758.

[40] In re Orman, 107 Fed. 101, 46 C. C. A. 165, 5 Am. Bankr. Rep. 698.

[41] In re Sheehan, 8 N. B. R. 353, Fed. Cas. No. 12,738. On dismissal of a petition in bankruptcy, where there was an agreement between the petitioners and the alleged bankrupt that they should divide the cost of stenographers, the bankrupt was entitled to recover as costs the part of that expense paid by him, but not the expense of a transcript of the testimony for his own use. In re Pearce (D. C.) 235 Fed. 917, 37 Am. Bankr. Rep. 710.

[42] Otherwise under the act of 1867. See In re Comstock, 5 N. B. R. 191, Fed. Cas. No. 3,074.

[43] In re Dibblee, 4 Ben. 304, Fed. Cas. No. 3,887.

[44] In re Hatcher, 145 Fed. 658, 16 Am. Bankr. Rep. 722.

[45] In re Holgate, 8 Ben. 355, Fed. Cas. No. 6,601.

[46] Ommen v. Talcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp.

at their own expense, and they will not be allowed their costs and expenses out of the estate, unless, perhaps, where it appears that the defense made by the trustee was captious or unwarranted.[47] Especially where issues in the bankruptcy proceeding, arising out of the involved condition of the claims, were caused entirely by the methods of the creditor, the trustee should not be charged with the costs.[48] As to proceedings taken by parties other than the trustee, such as judgment creditors, mortgagees, or other lien claimants, to set aside fraudulent conveyances, or otherwise to rescue or reclaim property alleged to belong to the estate in bankruptcy, the general rule is that they may be allowed compensation out of the estate for costs, expenses, and counsel fees, in so far as their efforts have inured to the benefit of the general creditors, in the way of creating or preserving a fund for distribution, but not otherwise.[49] The costs of an attachment, execution, or other process which was begun within four months prior to the bankruptcy proceedings, and is therefore annulled by the adjudication are not a lien on the property in the hands of the trustee. But on the same principle as that last above mentioned, a sheriff or other person who has had the custody of the property may be reimbursed for his expenses in caring for and preserving it.[50] But where property of the bankrupt was attached within four months before the filing of the petition, it is error to require, as a condition of delivery of the attached property to the trustee, that he shall pay counsel fees and costs to the attorney for the attaching creditor and the costs of the attachment.[51]

§ 773. **Persons, Property, or Funds Liable for Costs.**—In some circumstances, the bankrupt may be personally liable for costs. Thus, where he appeals from the adjudication against him, he cannot have an order on the receiver appointed below to pay the costs of the appeal simply on the ground of his own poverty.[52] There are also cases in

203; Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612.

[47] In re Stewart (D. C.) 178 Fed. 463, 24 Am. Bankr. Rep. 474. But see In re Waterloo Organ Co., 154 Fed. 657, 83 C. C. A. 481, 18 Am. Bankr. Rep. 752. Where the trustee contests the claim of an outsider, the controversy is inter partes, and costs follow as in any other case. In re All Star Feature Corp. (D. C.) 232 Fed. 1004. On the referee's finding for the claimant, seeking to reclaim property from the trustee in bankruptcy, the allowance of costs and disbursements to the claimant is in the referee's discretion. In re Reeves (D. C.) 227 Fed. 711, 36 Am. Bankr. Rep. 130. But see In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, 35 Am. Bankr. Rep. 213.

[48] Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437.

[49] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re J. C. H. Claussen & Co., 164 Fed. 300, 21 Am. Bankr. Rep. 34; In re Dumahaut, 19 N. B. R. 394, Fed. Cas. No. 4,126.

[50] In re Fortune, 1 Low. 306, 2 N. B. R. 662, Fed. Cas. No. 4,955; In re Williams, 2 N. B. R. 229, Fed. Cas. No. 17,705. And see supra, § 386.

[51] In re Shoemaker (C. C. A.) 205 Fed. 113, 30 Am. Bankr. Rep. 349.

[52] Herman Keck Mfg. Co. v. Lorsch, 179 Fed. 485, 103 C. C. A. 65, 24 Am. Bankr. Rep. 705.

which costs are properly payable by particular creditors, rather than out of the estate. Thus, where a petition in bankruptcy is dismissed because it is found that the bankrupt was insane at the time of committing the alleged act of bankruptcy, the costs may be charged against the petitioning creditors.[53] So where an execution creditor intervenes and opposes the adjudication, on the ground that the debtor is not insolvent, but unsuccessfully, the costs of the proceeding, in so far as the same was rendered necessary by his opposition, may be taxed against such intervener, including the fees of witnesses summoned by him and of any witnesses summoned by the petitioning creditors whose examination would not have been necessary but for the intervention.[54] On the other hand, petitioning creditors, who succeed in procuring an adjudication of bankruptcy, are entitled to be reimbursed out of the estate for their expenditures and to the allowance of a reasonable attorney's fee.[55] Where, on the application of creditors accompanying the petition in involuntary bankruptcy, property of the bankrupt is seized and held pending the adjudication, and the result is the securing or preserving for the estate of valuable property which otherwise would have been lost or dissipated, the petitioning creditors are entitled to reimbursement for their costs and expenses.[56] But where, such a course having been taken, the petition is dismissed, the damages occasioned by the seizure and detention of the property are recoverable, not indeed against the petitioning creditors generally, but against that creditor on whose application the property was seized.[57] Costs may also be awarded against a particular creditor who has insisted on and procured an unnecessary and fruitless examination of the bankrupt in the hope of discovering concealed assets,[58] or who has procured the appointment of a receiver, when such appointment proves to have been unauthorized or unnecessary,[59] or who has unsuccessfully opposed the bankrupt's application for discharge.[60]

Claimants of property and those asserting debts against the estate in bankruptcy are generally required to sustain the expense of contests. If a claim is disallowed, the claimant must pay the costs of the

[53] In re Ward, 203 Fed. 769, 29 Am. Bankr. Rep. 547.

[54] In re Carolina Cooperage Co., 96 Fed. 604. And see Petition of Kurtz Brass Bed Co. (D. C.) 250 Fed. 116, 42 Am. Bankr. Rep. 3.

[55] In re Mitteldorfer, Chase, 288, 3 N. B. R. 1, Fed. Cas. No. 9,675. And see Bankruptcy Act 1898, § 64b, cl. 3.

[56] In re Schwab, 3 Ben. 231, 2 N. B. R. 488, Fed. Cas. No. 12,498.

[57] In re Ward, 203 Fed. 769, 29 Am. Bankr. Rep. 547; T. E. Hill Co. v. United States Fidelity & Guaranty Co., 265 Ill. 534, 107 N. E. 194. See In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[58] In re Rozinsky, 101 Fed. 229, 3 Am. Bankr. Rep. 830.

[59] In re Wentworth Lunch Co. (C. C. A.) 191 Fed. 821, 27 Am. Bankr. Rep. 515; In re Charles W. Aschenbach Co., 183 Fed. 305, 105 C. C. A. 517, 25 Am. Bankr. Rep. 502.

[60] In re Miers, 193 Fed. 288, 27 Am. Bankr. Rep. 870; In re Amer (D. C.) 228 Fed. 576, 35 Am. Bankr. Rep. 627.

examination and hearing,[61] and even where the claimant succeeds in establishing his claim, as against opposition, the court will not allow him costs and attorneys' fees out of the estate.[62] And especially where the costs on the contest of a claim grew out of a controversy between creditors, entirely carried on for the purpose of controlling the election of the trustee, they will not be allowed out of the estate.[63] The case is somewhat different in regard to a mortgagee or other holder of a valid lien on particular property of the bankrupt. If such a creditor files and proves his claim in the bankruptcy proceedings for allowance and payment out of the proceeds of the property affected, he is properly chargeable with his pro rata share of the costs of the bankruptcy proceedings.[64] But where the court of bankruptcy, for the sake of realizing the supposed value of the equity of redemption in the mortgaged property, takes control of the same and causes it to be sold by the trustee, the creditor assenting to, but not inviting, such a course, the proceeds should not be charged with any part of the costs and expenses of the bankruptcy proceeding in general, incurred solely for the benefit of unsecured creditors, but since the mortgagee is benefited to the extent of having his lien foreclosed for him by the bankruptcy sale, he may properly be called upon to bear the actual costs and expenses of the sale,[65] and also, if equitable considerations justify it, to contribute towards the expense of caring for and preserving the property before the sale.[66] And whereas the 1910 amendment to the bankruptcy act authorizes the payment of commissions to the trustee out of the proceeds of the sale of incumbered property, it is held that this applies only to cases in which

[61] In re Rome, 162 Fed. 971, 19 Am. Bankr. Rep. 820; In re Todd, 109 Fed. 265, 6 Am. Bankr. Rep. 88; In re Schocket, 177 Fed. 583, 24 Am. Bankr. Rep. 47.

[62] In re Coventry Evans Furniture Co., 171 Fed. 673, 22 Am. Bankr. Rep. 623. See In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, 35 Am. Bankr. Rep. 213.

[63] In re Worth, 130 Fed. 927, 12 Am. Bankr. Rep. 566.

[64] In re Franklin (D. C.) 151 Fed. 642, 18 Am. Bankr. Rep. 218. See In re Elmore Cotton Mills (D. C.) 217 Fed. 810, 33 Am. Bankr. Rep. 544. Where a mortgagee of a bankrupt asserts a lien for an excessive amount, which is contested by the trustee, part or all of the expense thereby incurred, including an attorney's fee, may be charged against the fund which would otherwise go to the mortgagee. In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

[65] In re O'Gara Coal Co., 235 Fed. 83, 149 C. C. A. 195, 38 Am. Bankr. Rep. 131; In re Elmore Cotton Mills (D. C.) 217 Fed. 808, 33 Am. Bankr. Rep. 426; In re Rauch (D. C.) 226 Fed. 982, 36 Am. Bankr. Rep. 75; In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420; In re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, 19 Am. Bankr. Rep. 389; In re Howard, 207 Fed. 402; The Bethulia, 200 Fed. 879; Mills v. Virginia-Carolina Lumber Co., 164 Fed. 168, 20 Am. Bankr. Rep. 750; In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866. And see supra, § 571.

[66] See In re Evans Lumber Co., 176 Fed. 643, 23 Am. Bankr. Rep. 881. Compare In re Vulcan Foundry & Machine Co., 180 Fed. 671, 103 C. C. A. 637, 24 Am. Bankr. Rep. 825.

there was actually a substantial value to the equity of redemption, and in which, therefore, the bankruptcy court rightfully exercised its jurisdiction to sell free from liens, or in which the lienholder consented to a sale; but where the incumbered property brings much less than the amount of the liens on it, the trustee's commissions must be paid out of the bankrupt estate, and not by the lien creditors.[67] Where the trustees of a bankrupt corporation do not receive possession of its assets, because the same have been placed in the hands of receivers of another court in foreclosure proceedings, but they conceive it to be their duty to defend the foreclosure suits, and file a cross bill looking to the administration of the entire assets, they are entitled to have the compensation for themselves and their attorneys made a direct charge on the property prior to the claims of creditors and stockholders.[68]

Where the trustee brings suit to set aside a fraudulent conveyance, recover a preference, or the like, the costs are to be borne by the unsuccessful defendant, and not to be taken out of the property or fund recovered.[69] On the other hand, if he is unsuccessful in an action of this kind, the expense falls upon the estate in bankruptcy,[70] unless the trustee, being doubtful of the probable result of the action, has exercised his right to demand indemnity from those creditors who insist on his bringing the suit.[71] In the case of the bankruptcy of a partnership, the statute provides that "the expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine."[72]

Petitioning creditors, intervening creditors, and the alleged bankrupt may stipulate for an apportionment as between themselves of the costs and expenses of the proceeding, and in this case a creditor cannot set off against the amount of expenses taxed against him his demand against the bankrupt.[73]

§ 774. Taxation of Costs.—Claims for costs, expenses, and fees should be filed with the referee in bankruptcy, in order that they may

[67] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119. In re Russell Falls Co. (D. C.) 249 Fed. 260, 41 Am. Bankr. Rep. 448. But compare In re West (D. C.) 232 Fed. 903, 37 Am. Bankr. Rep. 421.

[68] Meddaugh v. Wilson, 151 U. S. 333, 14 Sup. Ct. 356, 38 L. Ed. 183.

[69] Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; Collins v. Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432. See In re H. B. Hollins & Co. (D. C.) 225 Fed. 618. But in an action by a trustee in bankruptcy to set aside an assignment by the bankrupt of his interest in remainder, the taxable costs of an infant defendant, who was impleaded in the action and defended by a guardian ad litem, should be paid out of the funds of the estate. Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817.

[70] Ommen v. Talcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572; In re Babcock, 1 Woodb. & M. 26, Fed. Cas. No. 697. And see supra, §§ 198, 308, 311, 432.

[71] See supra, § 283.

[72] Bankruptcy Act 1898, § 5e.

[73] King Hardware Co. v. J. G. Christopher Co., 222 Fed. 224, 138 C. C. A. 54, 34 Am. Bankr. Rep. 422.

be examined by parties in interest and that any person aggrieved by the ruling of the referee may have the same reviewed.[74] But the question of allowance may be determined by the referee ex parte, and notice to creditors of the hearing on such claims is not a prerequisite to the validity of his order.[75] And the amount to be allowed as a fee to the attorney of a voluntary bankrupt rests largely in the discretion of the referee, and his allowance will not be disturbed by the judge in the absence of evidence to show that it was unjust, excessive, or exorbitant.[76] Similarly, costs will be allowed to an alleged bankrupt on the dismissal of an involuntary petition against him only after the filing of his bill of costs with the clerk and notice to the petitioning creditors.[77] The statute allows, and gives priority to, "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."[78] But no attorney's fee can be allowed in voluntary proceedings, except upon proof of services actually rendered to the bankrupt in doing the things which the law requires of him.[79] And the statute does not make the allowance of an attorney's fee in involuntary cases a matter of right, but gives the court discretionary power, and where such an allowance is asked for, the attorney must disclose his dealings with his client, that the court may act intelligently in the matter.[80] Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of such vouchers.[81] And the claim of the marshal for expenditures must be supported by his own oath as to their amount and the necessity for them,[82] which, however, is not conclusive so as to preclude any further inquiry into the items charged.[83]

§ 775. Expenses of Administering Estates.—The authority and duty of a trustee in bankruptcy, with respect to expenditures for the care and preservation of the property committed to his charge, and the efficient administration of the estate in bankruptcy, have been discussed in an earlier section.[84] The general rule prescribed by the statute is as

[74] In re Stoddard Bros. Lumber Co., 169 Fed. 190, 22 Am. Bankr. Rep. 435; In re Rosenberg, 3 N. B. R. 73, Fed. Cas. No. 12,056.

[75] In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641.

[76] In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

[77] In re Haeseler-Kohlhoff Carbon Co., 135 Fed. 867, 14 Am. Bankr. Rep. 381.

[78] Bankruptcy Act 1898, § 64b, cl. 3.

[79] In re Terrill, 103 Fed. 781, 4 Am. Bankr. Rep. 625.

[80] In re Carr, 117 Fed. 572, 9 Am. Bankr. Rep. 58.

[81] In re Comstock, 9 N. B. R. 88, Fed. Cas. No. 3,075.

[82] In re Hellmar, 4 Sawy. 163, 17 N. B. R. 362, Fed. Cas. No. 6,342.

[83] In re Pace, Fed. Cas. No. 10,640.

[84] See supra, § 308.

follows: "The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred." [85] The term "officers" here used includes others beside the trustee. Thus, a deputy marshal appointed to take charge of a bankrupt's store and the stock of goods therein, and responsible on his bond for the value of the property, may hire a competent person as watchman if he has any reason to apprehend danger to the property, and charge in his accounts a reasonable sum as compensation for the services of such watchman.[86] But the creditors are not officers; and hence, for instance, the expenses of the creditors in attending meetings will not be allowed out of the estate.[87] It is, in fact, the obvious policy of the act, manifest in all its provisions respecting expenses and fees, to reduce to a minimum the expense of administering estates, and the courts are bound to give the statute such a construction and application as will fulfill the intention of Congress in this regard.[88] There is a provision in the general orders, as to requiring indemnity for expenses about to be incurred, which is expressed as follows: "Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may

[85] Bankruptcy Act 1898, § 62a. Where a trustee in bankruptcy paid attorneys' fees, leaving an insufficient amount in his hands to pay a watchman employed to care for the property of the estate, he must stand the loss unless he can obtain a refund from the attorneys. In re Mitchell, 212 Fed. 932, 129 C. C. A. 452. Where a bankrupt with concealed assets purchased and conducted a business in another district in the name of another, who afterwards went into bankruptcy, the cost of administration of both estates in that district will be payable from the proceeds of the property therein. In re Offricht (D. C.) 260 Fed. 682, 43 Am. Bankr. Rep. 345. On bankruptcy proceedings of a stockbroker, the allowances to the special master and the expense for stenographic minutes must come preliminarily out of the general estate; if that is not sufficient they should come pro rata out of securities or their proceeds available to least favored claimants; and if not satisfied by such securities, out of securities of most favored claimants. In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350. Where property is finally adjudged not to belong to the estate in bankruptcy and is taken out of the trustee's possession on reclamation proceedings by the owner, charges for storing the property prior to the filing of the reclamation petition may be made against such owner. In re John H. Parker Co. (D. C.) 268 Fed. 868, 45 Am. Bankr. Rep. 34. Where one creditor on his own responsibility has recovered assets of the estate by suit, and is entitled to be reimbursed for the reasonable expense of such recovery, he may properly retain such expense from the proceeds of the judgment and pay over the remainder only to the trustee. In re Kenny (D. C.) 269 Fed. 54, 46 Am. Bankr. Rep. 214.

[86] In re Scott (D. C.) 99 Fed. 404, 3 Am. Bankr. Rep. 625. Compare In re Pickhardt (D. C.) 198 Fed. 879, 29 Am. Bankr. Rep. 524.

[87] In re Ward, 9 N. B. R. 349, Fed. Cas. No. 17,145.

[88] In re Harrison Mercantile Co. (D. C.) 95 Fed. 123, 2 Am. Bankr. Rep. 419. And see In re Metallic Specialty Co. (D. C.) 215 Fed. 937.

require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expenses. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same."[89] But it is held that this does not apply to the filing fees which the clerk is directed to collect upon the filing of a voluntary petition in bankruptcy, and this money is not to be returned to the bankrupt.[90]

§ 776. **Fees of Clerks.**—The bankruptcy act provides that the clerks of the courts of bankruptcy "shall receive as full compensation for their service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt."[91] The matter of furnishing certified copies of records is provided for in another section of the statute, as follows: "Clerks shall respectively account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers."[92] These provisions are explained and reconciled in the general orders, which declare that "the fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers."[93] Where the local rule of court provides that the notice of final meeting shall be issued by the clerk in accordance with Official Form No. 57, which includes the petition for the bankrupt's discharge, the order of notice, jurat, etc., it is held that the clerk is not entitled to charge a fee of 25 cents for each notice sent to creditors, on petition for discharge, but is only entitled to the actual items of expense thereon for postage, stationery, and clerical assistance.[94]

[89] General Orders in Bankruptcy, No. 10.

[90] In re Matthews (D. C.) 97 Fed. 772, 3 Am. Bankr. Rep. 265.

[91] Bankruptcy Act 1898, § 52a.

[92] Bankruptcy Act 1898, § 51a.

[93] General Order No. 35, par. 1. An allowance to the clerk of the District Court for expenses in mailing bankruptcy notices, duly approved by the court, is not subject to collateral attack; and the clerk cannot be required to account to the government for the sums so allowed him. United States v. United States Fidelity & Guaranty Co. (D. C.) 263 Fed. 442, 45 Am. Bankr. Rep. 295. Clerks of federal courts are not entitled to fees for sending out copies of the petition and notice of an application for a bankrupt's discharge, but are only entitled to charge the necessary expenses therefor. In re Loughney (D. C.) 218 Fed. 980, 34 Am. Bankr. Rep. 206.

[94] In re Dunn Hardware & Furniture Co., 134 Fed. 997, 14 Am. Bankr. Rep. 186.

§ 777. **Fees and Expenses of Marshals and Receivers.**—In its original form, the bankruptcy act of 1898 authorized courts of bankruptcy to appoint receivers (or marshals to act as receivers) to take possession of the property of alleged bankrupts, when necessary, after the filing of the petition, and until it should either be dismissed or an adjudication made and a trustee appointed and qualified. But it made no special provision for the compensation of such receivers. In 1903 it was amended so far as to authorize the courts of bankruptcy, when the business of a bankrupt had been continued and carried on by a receiver or the marshal, to allow him additional compensation for such services, "but not at a greater rate than in this act allowed trustees for similar services." At that time the compensation of trustees was fixed by the forty-eighth section of the act, and consisted, in addition of the filing fee of five dollars, of commissions on all moneys disbursed by them at fixed percentages varying with the total amount. And some of the decisions held that a receiver might be allowed the maximum commission which would be awarded to a trustee in similar cases, but could claim nothing extra for carrying on the bankrupt's business.[95] The general rule, however, was that the court had authority to allow the receiver a just and reasonable compensation for his personal services, the amount of which rested in the sound discretion of the court and should depend upon all the circumstances of the particular case.[96] But in 1910, this subject underwent a complete revision at the hands of Congress, and the forty-eighth section of the act was rewritten, the portions of it applicable to the compensation of receivers and marshals being made to read as follows:

"(d) Receivers or marshals appointed pursuant to section two, subdivision three of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow,[97] not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys

[95] In re Cambridge Lumber Co., 136 Fed. 983, 14 Am. Bankr. Rep. 168; In re Richards, 127 Fed. 772, 11 Am. Bankr. Rep. 581.

[96] In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; Dunlap Hardware Co. v. Huddleston, 167 Fed. 433, 21 Am. Bankr. Rep. 731; In re Huddleston, 167 Fed. 428, 21 Am. Bankr. Rep. 669; In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Sully, 133 Fed. 997, 13 Am. Bankr. Rep. 783; In re Adams Sartorial Art Co., 101 Fed. 215, 4 Am. Bankr. Rep. 107. And see, supra, § 216.

[97] Where the receiver turns over to the trustee cash, and also the bankrupt's stock, fixtures, and uncollected book accounts, he is entitled, at the time, to a commission on the cash only; he is not entitled to an allowance on the property

in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars; provided, that in case of the confirmation of a composition, such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions;[98] provided further, that when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee; provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.[99]

"(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars," with the same proviso as to the case of

turned over in kind until the trustee has realized on it. In re Falkenberg (D. C.) 206 Fed. 835, 30 Am. Bankr. Rep. 718.

[98] Where a composition is offered after the appointment of a trustee, the receiver may be allowed such amount as the court sees fit to allow up to the regular percentage. In re Miller (D. C.) 243 Fed. 242, 40 Am. Bankr. Rep. 155.

[99] The compensation of receivers specified in the Bankruptcy Act is not intended as a fixed, invariable amount to be awarded, but as the maximum to be allowed only in cases justifying it. And in the view of the provision of § 48b, relating to the division of the compensation of trustees, where there are several, the same rule applies as to receivers, and though there is more than one receiver the compensation cannot be increased, but the fees must be divided. In re Mills Tea & Butter Co. (D. C.) 235 Fed. 813, 37 Am. Bankr. Rep. 148. An allowance to the receiver in excess of the maximum fixed by the Bankruptcy Act cannot be allowed to stand, as it is beyond the power of the court, and the principle is not altered by the fact that no objection to such excessive allowance was made by attorneys representing

the confirmation of a composition, and as to notifying creditors of the application for compensation.[100]

Where a receiver is appointed pending the petition in bankruptcy, the petitioning creditor is required to give a bond, and if the petition is dismissed or withdrawn, "counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."[101] But the court has power in the first instance to direct that the expenses and the compensation of the receiver shall be paid out of the property in his hands, although the proceedings are afterwards dismissed, as it is no part of the receiver's duty to move to recover such expenses and compensation against the petitioning creditors.[102] Where, after the appointment of a receiver, a second petition is filed in another district, where an adjudication is made, and to which the proceedings are transferred, as being the district of the bankrupt's domicile, the court in the latter district has jurisdiction to fix the compensation of the receiver, although payment can only be made on order of the court having the custody of the estate.[103] Where the receiver is afterwards appointed trustee, the settlement of his fees should be determined in connection with the claim for commissions and fees for services rendered to the estate as a whole.[104] In regard to the additional compensation to be allowed to the receiver when he carries on the business of the bankrupt, it has been held that a receiver who takes possession of the bankrupt's store, advertises a sale, and keeps the store open, for the purpose of retail sale, only for the remainder of the day on which he takes possession, and then closes the store and sells the stock in bulk, is not a mere custodian, but on the other hand, he does not "carry on the business" of the bankrupt so as to entitle himself to the extra compensation.[105] It should be observed that the requirement of notice to

nearly all the creditors, in view of the receiver's unusual assiduity and attention to the proceedings. In re Weissman (D. C.) 267 Fed. 588, 46 Am. Bankr. Rep. 189. And see In re Metropolitan Motor Car Co. (D. C.) 225 Fed. 274, 35 Am. Bankr. Rep. 539.

[100] Bankruptcy Act 1898, § 48, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[101] Bankruptcy Act 1898, § 3e. Where a company not subject to adjudication in bankruptcy acquiesced in the appointment of receivers and their conducting its business for a considerable time, it is liable for their compensation. In re Wilkes-Barre Light Co. (D. C.) 235 Fed. 807, 38 Am. Bankr. Rep. 99.

[102] In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

[103] In re Isaacson, 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

[104] In re James Carothers & Co., 182 Fed. 501.

[105] In re Charles Knosher & Co., 197 Fed. 136, 116 C. C. A. 560, 28 Am. Bankr. Rep. 747. Where the receiver inventories the bankrupt's stock, has it appraised, and sells it, he is more than a mere custodian, though he does not carry on the business, and he is entitled to such compensation as the court may allow for his entire services, within the general provisions of the section. In re Ginsburg, 208 Fed. 160. A receiver of bankrupts for a sale of their property, after hav-

creditors of the receiver's application for compensation is imperative, and no allowance of fees can rightfully be made until after such notice.[106] Creditors desiring to object should promptly file exceptions with the referee, and may bring the matter before the court by petition for review of the decision of the referee on the questions thus raised.[107] If the receivership was obtained by fraud or imposition practised upon the court, and was in no way beneficial to the estate, the court will be justified in refusing to make any allowance for the services of the receiver.[108]

In regard to the fees of the marshal, where he does not act as receiver, the provision of the statute is that "marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals." [109] But where the court of bankruptcy, upon the filing of a petition in involuntary bankruptcy, orders the marshal to take possession of the property of the bankrupt and hold the same until a trustee is appointed, the marshal is entitled to receive, out of the estate, compensation for his services under such order, in addition to the costs and expenses incurred.[110] As to expenses so incurred, it is held that a marshal thus placed in charge may hire a competent watchman or store-keeper, if he considers it necessary for the preservation of the property, and the reasonable pay of such a keeper will be allowed out of the estate.[111] The general orders provide that "the marshal shall make return under oath of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him,

ing it in possession not more than six days, during which time the store was closed, was held entitled to a fee not exceeding 2 per cent. on the first $1,000, and one-half of one per cent. on the balance. In re Griesheimer (D. C.) 209 Fed. 134, 31 Am. Bankr. Rep. 567.

[106] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718; In re Cash-Papworth Grow-Sir, 210 Fed. 24, 136 C. C. A. 604, 31 Am. Bankr. Rep. 709.

[107] In re Reliance Storage & W. Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49.

[108] In re Desrochers, 183 Fed. 991, 25 Am. Bankr. Rep. 703.

[109] Bankruptcy Act 1898, § 52b. The fees and compensation of United States marshals are fixed by Rev. Stat. U. S. § 829. As to mileage on service of process, see In re Talbot, 2 N. B. R. 280, Fed. Cas. No. 13,727; Anonymous, Fed. Cas. No. 437. As to allowance of fee for serving order to show cause in bankruptcy proceeding, see In re Damon, 104 Fed. 775, 5 Am. Bankr. Rep. 133.

[110] In re Adams Sartorial Art Co., 101 Fed. 215, 4 Am. Bankr. Rep. 107; In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692. See In re Burnell, 7 Biss. 275, 14 N. B. R. 498, Fed. Cas. No. 2,171.

[111] In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Lowenstein, 3 Ben. 422, 3 N. B. R. 268, Fed. Cas. No. 8,572; In re Comstock, 9 N. B. R. 88,

with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable." [112]

The subject of the costs and expenses which may properly be incurred by a receiver, and allowed out of the estate in bankruptcy, has been discussed in an earlier section.[113] But it may here be added that the expenses incurred by a receiver, in counsel and witness fees, in resisting a motion for his removal, will be allowed as a charge upon the fund or estate, where it appears that, although there were apparent grounds for the motion, yet the receiver had acted in good faith and with integrity of purpose.[114]

§ 778. **Compensation of Trustees.**—The bankruptcy act provides that "trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case,[115] except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified, the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition." [116] The general orders also provide that "the compensation allowed to trustees by the act shall be in full compensation for the services performed by them, but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts." [117] This provision of the statute is mandatory and must be followed, and the court has no authority to allow to a trustee a lumping sum in lieu of commissions calculated as the act directs.[118] Further, the commission must be calculated, as the statute

Fed. Cas. No. 3,075; In re Pace, Fed. Cas. No. 10,640; In re Johnston, 8 Ben. 191, 12 N. B. R. 345, Fed. Cas. No. 7,421.

[112] General Orders in Bankruptcy, No. 19.

[113] Supra, § 216.

[114] Cowdrey v. Railroad Co., 1 Woods, 331, Fed. Cas. No. 3,293.

[115] Where a partnership and its individual members are adjudged bankrupt on a single petition, there is but one "case" for the purpose of computing the fees and commissions of the trustee, for the word "case" is used in the bankruptcy act in its ordinary meaning as a comprehensive term, embracing the aggregate in respect to that which is brought and prosecuted in the form of a single proceeding. In re Rider (D. C.) 220 Fed. 193, 34 Am. Bankr. Rep. 280.

[116] Bankruptcy Act 1898, § 48a, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[117] General Order in Bankruptcy No. 35, par. 3.

[118] In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154.

prescribes, on the amount of money disbursed or turned over, not on the gross amount collected.[119] But money is disbursed or turned over by the trustee, when it is paid into the hands of a receiver appointed by a state court in a suit between the bankrupt and a creditor, the former claiming it as exempt and the latter denying the contention.[120] Aside from the question of expenses necessarily incurred, the courts have sometimes made extra allowances to trustees in bankruptcy for unusual or highly beneficial services to the estates in their charge.[121] But the provision of the seventy-second section of the act (added by the amendment of 1903) is explicit that "neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." And the doctrine now prevails that this interposes an absolute bar to any extra allowance to the trustee, no matter how onerous or inconvenient his duties may have been, or how efficient or meritorious his services.[122] Thus, if the trustee is himself a lawyer, he is not bound to perform legal services, but if he does, he cannot have a fee from the estate.[123] And even where a creditor, desiring to secure the services of a particular person as trustee, promises him a sum in excess of the commissions which he will receive, the bargain is void and cannot be enforced in the face of the express prohibition contained in the statute.[124]

If the business of the bankrupt is carried on for a limited time by the trustee, under authority of the court, he may be allowed additional compensation for his services in such business. The amount of it rests very much in the discretion of the court, having regard to the nature of the services rendered and their benefit to the estate, provided that it shall not exceed the percentages specified in the act.[125] But the court

[119] In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559. Where, to preserve the assets of a bankrupt, they were transferred to a corporation for a small sum, and both secured and unsecured creditors received stock, the trustee's commissions must be based on the cash. American Surety Co. v. Freed, 224 Fed. 333, 140 C. C. A. 19, 35 Am. Bankr. Rep. 103.

[120] In re Castleberry (D. C.) 143 Fed. 1021, 16 Am. Bankr. Rep. 430.

[121] In re Dimm & Co., 146 Fed. 402, 17 Am. Bankr. Rep. 119; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651.

[122] In re Coventry Evans Furniture Co., 171 Fed. 673, 22 Am. Bankr. Rep. 623; In re Screws, 147 Fed. 989, 17 Am. Bankr. Rep. 269; In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Epstein, 109 Fed. 878, 6 Am. Bankr. Rep. 191.

[123] In re George Halbert Co., 134 Fed. 236, 67 C. C. A. 18, 13 Am. Bankr. Rep. 399; In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185; In re Van Denburg (D. C.) 221 Fed. 475, 34 Am. Bankr. Rep. 521.

[124] Devries v. Orem, 104 Md. 648, 65 Atl. 430; Cowing v. Altman, 5 Hun (N. Y.) 556.

[125] In re George W. Shiebler & Co., 174 Fed. 336, 98 C. C. A. 208, 23 Am. Bankr. Rep. 162; In re Plummer, 2 Nat. Bankr. News, 292. Where the trustee "disburses" only the profit realized from carrying out a contract of the bankrupt,

has no authority to fix the compensation of a trustee in advance for such services to be rendered in the future.[126] The act also provides that "the court may, in its discretion, withhold all compensation from any trustee who has been removed for cause." [127] And it is held that this is applicable to a case where there was sufficient ground for the removal of a trustee, but, to avoid the odium of such a course, he was allowed to resign.[128] And since, within the limits fixed by law, the amount to be allowed as commissions to a trustee is subject to the sound judicial discretion of the court, it is held that, where a trustee has been negligent in the performance of his duty, the court may in a proper case, and even without the filing of any exceptions, deny him any commissions.[129] Where legal expenses are incurred in consequence of the negligent, irregular, or unauthorized actions of the trustee in dealing with the estate, as, for example, in contracting to sell property at private sale, but without the sanction or approval of the court or referee, they may be charged against his commissions.[130]

§ 779. **Fees and Expenses of Referees.**—Provision for the compensation of referees in bankruptcy is made by the statute in the following terms: "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." [131] Originally the act allowed referees' commissions

that is the only sum on which he can receive commissions, regardless of the total amount involved. In re New York Commercial Co., 231 Fed. 445, 145 C. C. A. 439, 36 Am. Bankr. Rep. 496.

[126] In re Willis W. Russell Card Co., 174 Fed. 202, 23 Am. Bankr. Rep. 300.

[127] Bankruptcy Act 1898, § 48c. See In re Leverton, 155 Fed. 931, 19 Am. Bankr. Rep. 434.

[128] In re E. I. Fidler & Son, 172 Fed. 632, 23 Am. Bankr. Rep. 16.

[129] In re Schoenfeld, 183 Fed. 219, 105 C. C. A. 481, 25 Am. Bankr. Rep. 748. And see In re Sweetser (D. C.) 240 Fed. 174.

[130] In re Eden Musee American Co. (D. C.) 230 Fed. 925, 36 Am. Bankr. Rep. 111.

[131] Bankruptcy Act 1898, § 40, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797. See In re J. B. White & Co. (D. C.) 225 Fed. 796, 85 Am. Bankr. Rep. 670. It is not proper to calculate the referee's commission on the total amount of the bankrupt's estate, but only on that portion distributable to creditors. In re Motridge, 258 Fed. 229, 169 C. C. A. 539, 44 Am. Bankr. Rep. 175. The referee is entitled to commissions on the amount of claims which would have been paid in cash under a composition agreement, if the creditors had not waived such payment in consideration of a smaller cash payment and the balance in notes given by another corporation. In re H. Batterman Co., 231 Fed. 699, 145 C. C. A. 585, 36 Am. Bankr. Rep. 695. The ref-

only on sums disbursed as "dividends and commissions." But the larger terms introduced by the amendment of 1903 permit the payment of commissions on moneys paid over to secured creditors or realized from the sale of incumbered property.[132] But the moneys must still be "disbursed to creditors." Hence, in a case where the referee continued the bankrupt's business in order to complete certain government contracts, and for that purpose raised and paid out nearly half a million dollars during a period of eighteen months, and, as a result, distributed to creditors about thirty thousand dollars, it was held that he was entitled to commissions only on the latter sum.[133] There has been a practice of referring particular issues or matters arising in the course of a bankruptcy case to the referee in the character of a special master, and allowing him fees or compensation as such.[134] For instance, where objections to a bankrupt's application for discharge are referred to the referee for hearing and report, it has been held that he is entitled to a reasonable allowance for his services, in addition to the fees allowed him by the bankruptcy act.[135] In this and similar cases, the theory probably has been that the commissions specified in the act were intended only to compensate the referee for the performance of duties strictly incident to his office, and such as must be performed in every case referred to him, as a matter of mere routine administration. Thus, it is said that a referee cannot make an extra charge for his services in presiding at creditors' meetings, conducting the bankrupt's examination, or making out the dividend sheet, as these services are particularly required of him by the statute and are supposed to be compensated by the

eree's commission is estimated on moneys disbursed to creditors, and not on the claims and liabilities scheduled. In re Philips & McEachin, 210 Fed. 889, 127 C. C. A. 499, 31 Am. Bankr. Rep. 542. Rent of leased premises occupied by the trustee is not a disbursement to a creditor on which the referee is entitled to a commission. Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390. Where, in a composition case, 25 per cent. in cash or 100 per cent. in stock (at par) of a corporation formed to take over the bankrupt's business were offered as alternatives, it was held that the referee's commission should be computed on the theory that the stock was worth 25 per cent. of its par value. In re Mills Tea & Butter Co. (D. C.) 235 Fed. 815, 37 Am. Bankr. Rep. 711.

[132] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119. The referee is not entitled to recover fees out of the proceeds of a sale of mortgaged property when it brings less than the amount of the mortgage debt. In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529.

[133] Bray v. Johnson, 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383. And see In re J. Bacon & Sons (D. C.) 224 Fed. 764, 34 Am. Bankr. Rep. 825; In re M. F. Rourke Co. (D. C.) 209 Fed. 877, 31 Am. Bankr. Rep. 788.

[134] In re Hurley, 204 Fed. 126, 29 Am. Bankr. Rep. 567; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552. See In re Talton, 137 Fed. 178, 14 Am. Bankr. Rep. 617.

[135] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re Grossman, 111 Fed. 507, 6 Am. Bankr. Rep. 510; Bragassa v. St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154. 5 Am. Bankr. Rep. 700. Contra, In re

fifteen dollar fee.[136] But on the other hand, nothing could be more positive than the language of the amendatory act of 1903 (section 72) that "neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." And it is held that this absolutely prohibits the court of bankruptcy from allowing any extra or additional compensation to the referee for any services whatever,[137] and, in particular, that it deprives the court of any authority to convert a referee in bankruptcy into a special master and compensate him as such.[138] But on the other hand, the compensation of the referee as fixed by the statute will not be abated or diminished in a particular case because some of the duties which ordinarily would be discharged by the referee, in the holding of hearings and making of orders, were assumed by the judge, at the request of the parties, on account of the magnitude of the interests involved and the unusual character of the proceedings.[139]

The referee is entitled to reimbursement for expenses necessarily incurred by him in the performance of his duties.[140] And he may make a general charge for blanks used in mailing notices to creditors and for orders entered, and also for the hire of a clerk, where the extent of his business is such that a clerk is needed, which charge should be a gross sum, and uniform in each case, regardless of the amount of work done.[141] And the expenses incurred in the publication of notice of application for

Wilcox, 156 Fed. 685, 19 Am. Bankr. Rep. 241.

[136] In re Barker, 111 Fed. 501, 7 Am. Bankr. Rep. 132.

[137] In re Daniels, 130 Fed. 597, 12 Am. Bankr. Rep. 446; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651; Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; In re Troth, 104 Fed. 291, 4 Am. Bankr. Rep. 780; United States v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep. 711.

[138] In re Sweeney, 168 Fed. 612, 94 C. C. A. 90, 21 Am. Bankr. Rep. 866; In re Nankin, 246 Fed. 811, 159 C. C. A. 113, 40 Am. Bankr. Rep. 459; In re Growe Const. Co. (D. C.) 253 Fed. 981, 42 Am. Bankr. Rep. 654; In re Langford, Felts & Myers (D. C.) 225 Fed. 311, 35 Am. Bankr. Rep. 519.

[139] In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306.

[140] General Order No. 35, par. 2. The court of bankruptcy may authorize a referee to employ a clerk and may allow expenses for stationery, office rent, light, heat, and telephone, and such authorization may be made by standing rule or order, or by special order in any particular case. United States v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep. 711. The referee is entitled to an allowance for the hire of a stenographer where correspondence with persons interested in the estate was so great that he could not personally attend to it all. In re Capital Security Co. (D. C.) 251 Fed. 927, 41 Am. Bankr. Rep. 184. Referees in bankruptcy, where it is reasonably necessary, are entitled to maintain offices for the transaction of their business, and to employ clerical assistance, and the expense may be prorated and charged to the various estates referred to them. In re McNeil Corp. (D. C.) 249 Fed. 765, 41 Am. Bankr. Rep. 162.

[141] In re Pierce, 111 Fed. 516, 6 Am. Bankr. Rep. 747; In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651. Compare In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Dean, 1 N. B. R. 249, Fed. Cas. No. 3,699.

discharge, and for stationery, are chargeable against the bankrupt.[142] It was also held under the act of 1867 that the traveling expenses of a nonresident referee, when apportioned among the several cases before him, would be allowed.[143] The referee's order allowing fees to himself and the trustee is reviewable by the court,[144] even after payment has been made to the trustee, if the referee's account was not presented to and passed upon by the court as required,[145] but not where his account was duly kept, presented, and approved, and distribution of the estate has already been made.[146] However, where a referee has collected from parties or estates in bankruptcy proceedings, as compensation, money to which he is not legally entitled, and these fees have been collected or withheld from parties who are numerous, and the individual amounts are small, the United States may maintain a single action on his bond, on behalf of all parties injured, to recover back such illegal fees; and as the court of bankruptcy has no jurisdiction to allow to a referee under any form or guise any other or further compensation than that expressly authorized and prescribed by the bankruptcy law, such allowance, if made, does not bar an action for its recovery.[147]

§ 780. On What Sums Commissions are Calculated.—As originally enacted, the bankruptcy act allowed commissions to the referee and trustee on sums disbursed "as dividends and commissions." And it was held that this restricted them to the specified percentage on such sums as were available for, and distributed to, the general or unsecured creditors; that the payment in full of those claims which were entitled to priority (taxes, labor claims, etc.) was not the payment of a "dividend," and that commissions could not be reckoned either on the amount so paid out or on sums paid over to mortgagees or other secured creditors or lien holders.[148] Also it was held that the setting apart of a homestead

[142] In re Dixon, 114 Fed. 675, 8 Am. Bankr. Rep. 145.

[143] In re Sherwood, 1 N. B. R. 344, Fed. Cas. No. 12,774. This is explicitly allowed under General Order No. 35, par. 2.

[144] In re Allert, 173 Fed. 691, 23 Am. Bankr. Rep. 101. See In re Reliance Storage & W. Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49. An order allowing the fees and compensation of a referee in bankruptcy is a judicial order and cannot be collaterally attacked. United States v. Brainerd (D. C.) 250 Fed. 1011, 41 Am. Bankr. Rep. 342.

[145] In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651.

[146] In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

[147] United States v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep. 711.

[148] In re Iowa Falls Mfg. Co., 140 Fed. 527, 15 Am. Bankr. Rep. 384; In re Hinckel Brewing Co., 124 Fed. 702, 10 Am. Bankr. Rep. 692; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651; Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122; In re Barker, 111 Fed. 501, 7 Am. Bankr. Rep. 132; In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559; In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306; In re Fielding, 96 Fed. 800, 3 Am. Bankr. Rep. 135; In re Fort

exemption to the bankrupt from the proceeds of property sold by the trustee was not the making of a dividend, so as to entitle these officers to a commission on the amount.[149] From this rule it sometimes resulted that the whole of the assets of an estate in bankruptcy would be consumed in the payment of priority claims and secured debts, and that nothing whatever would be left on which the commissions of the trustee and referee could be calculated. Yet this was held to be immaterial, and that, in such cases, their services must go unrewarded, except for the trifling filing fees.[150] But the amendatory act of 1903 altered this by allowing commissions on moneys "disbursed to creditors," and this was still further enlarged by the amendment of 1910, which allows the commissions to be reckoned on "all moneys disbursed or turned over to any person, including lien holders." At present, therefore, trustees are to be allowed commissions on moneys received and disbursed by them which were derived from the sale of mortgaged property, and which were covered by and applicable to the payment of the lien.[151] And this rule applies although the property is purchased by the party holding the incumbrance, the price in such case being treated as constructively paid to the trustee.[152] So also, the officers are entitled to commissions on all sums which would have been paid through the trustee but for an outside agreement between the parties and their attorneys.[153] But when the trustee is permitted to sell pledged collaterals on paying the debt for which they were pledged, it is held that the balance of the price after paying the debt constitutes the "money disbursed" on which the com-

Wayne Electric Corp., 94 Fed. 109, 1 Am. Bankr. Rep. 706; In re Fielding, 2 Nat. Bankr. News, 735; In re Sabine, 1 Nat. Bankr. News, 312.

[149] In re Gardner (D. C.) 103 Fed. 922, 4 Am. Bankr. Rep. 420.

[150] Smith v. Township of Au Gres, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876, 17 Am. Bankr. Rep. 745.

[151] In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251. See In re Anders Push Button Telephone Co. (D. C.) 136 Fed. 995, 13 Am. Bankr. Rep. 643 But notwithstanding the amendment of 1910, a trustee in bankruptcy is not entitled to a commission where the proceeds of incumbered property disposed of in bankruptcy are insufficient to satisfy the liens on it. In a proper case the lienholders may be charged with the costs of foreclosure, since that is for their benefit, but not with part of the expense of administering the estate, in which, in the case supposed, they have no interest. Gugel v. New Orleans Nat. Bank, 239 Fed. 676, 152 C. C. A. 510, 39 Am. Bankr. Rep. 160; C. B. Norton Jewelry Co. v. Hinds, 245 Fed. 341, 157 C. C. A. 533, 40 Am. Bankr. Rep. 320; In re Stewart (D. C.) 193 Fed. 791, 27 Am. Bankr. Rep. 529.

[152] In re West (D. C.) 232 Fed. 903; In re Sanford Furniture Mfg. Co. (D. C.) 126 Fed. 888, 11 Am. Bankr. Rep. 414; In re Morse Iron Works & Dry Dock Co. (D. C.) 154 Fed. 214, 18 Am. Bankr. Rep. 846. But compare In re Fort Wayne Electric Corp. (D. C.) 94 Fed. 109, 1 Am. Bankr. Rep. 706; In re Elk Valley Coal Mining Co. (D. C.) 213 Fed. 383, 32 Am. Bankr. Rep. 197; In re Columbia Cotton Oil & Provision Corp., 210 Fed. 824, 127 C. C. A. 374, 31 Am. Bankr. Rep. 339. And see In re Old Oregon Mfg. Co. (D. C.) 236 Fed. 804, 38 Am. Bankr. Rep. 409.

[153] In re Sanford Furniture Mfg. Co., 126 Fed. 888, 11 Am. Bankr. Rep. 414.

missions are to be estimated.[154] But property which comes into the possession of the trustee through the fraud of the bankrupt, and which is restored to the victim of the fraud, is not a part of the estate in bankruptcy out of which the officers may be allowed their statutory percentage.[155] And the same is true of real estate for the recovery of which the trustee has brought suit, but which never comes into the estate, because it is made the subject of a private settlement between the claimant and the creditors, the trustee thereupon dismissing his suit.[156]

§ 781. **Fees of Attorneys.**—Aside from the fees allowed for routine professional work in bankruptcy cases, the general rule is that compensation may be allowed to an attorney at law out of a particular property or fund before the court only when his services have had the effect of preserving it for the true owner, and out of the estate in general only when his services have resulted in adding to it, increasing its value, freeing it from claims, or otherwise benefiting the general body of creditors.[157] And while the amount of compensation rests largely in the sound judicial discretion of the court, yet even this must be controlled by the general purpose and policy of the act, which requires that, just as far as possible, all the assets shall be available for the creditors, and that estates in bankruptcy shall be administered with severe economy and at a minimum of expense.[158] Only a reasonable fee will be allowed to an attorney in any event,[159] and where a rule of court fixes the scale of fees allowable, such allowances will not be increased except in most unusual cases.[160] It is generally the referee, in the first instance, who will determine whether any, and what, fees shall be allowed, and he is by no means required to allow the fee claimed by the attorney or agreed upon between the attorney and the trustee, but may and should reduce it if he thinks it too great.[161] This question may be determined by the ref-

[154] In re Meadows, 199 Fed. 304, 29 Am. Bankr. Rep. 165.

[155] Gillespie v. J. C. Piles & Co., 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502; In re J C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[156] In re Kaiser, 112 Fed. 955, 8 Am. Bankr. Rep. 108.

[157] Gillespie v. J. C. Piles & Co., 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502; In re Huddleston, 167 Fed. 428, 21 Am. Bankr. Rep. 669; In re Covington, 132 Fed. 884, 13 Am. Bankr. Rep. 150; In re Irwin, 177 Fed. 284, 22 Am. Bankr. Rep. 165; In re W. B Terrell Co. (D. C.) 250 Fed. 317, 40 Am. Bankr. Rep. 138.

[158] Dunlap Hardware Co. v. Huddleston, 167 Fed. 433, 21 Am. Bankr. Rep. 731; In re Young, 142 Fed. 891, 16 Am. Bankr. Rep. 106; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Lang, 127 Fed. 755, 11 Am. Bankr. Rep. 794.

[159] In re Talton, 137 Fed. 178, 14 Am. Bankr. Rep. 617. The fee of an attorney collecting $6,000 for the bankrupt estate from the insurers on the occurrence of a loss was held properly allowable in the sum of $500. American Sav. Bank & Trust Co. v. Munson, 93 Wash. 78, 159 Pac. 1195.

[160] In re Keller, 207 Fed. 118, 31 Am. Bankr. Rep. 51.

[161] In re Ferreri, 188 Fed. 675, 26 Am. Bankr. Rep. 658.

eree ex parte, that is, it is not necessary that he should give to creditors notice of the pendency of the question and an opportunity to be heard thereon,[162] but he should be satisfied by evidence of the character and value of the attorney's services, and may suspend action on the application until satisfactory evidence is produced.[163] The decision of the referee, since it depends so much upon the exercise of judgment and discretion, will not be disturbed by the judge, in the absence of evidence to show that the fee allowed was exorbitant or excessive,[164] but the referee's discretion is judicial and not arbitrary, and even though he recommends the allowance of a particular fee, it will be reduced by the judge, if the latter regards it as extravagant,[165] or even by the appellate court, if the judge has failed to exercise his own discretion with a due regard to the policy of the statute and the rights of the parties.[166] Where more than one attorney or set of attorneys render services for the benefit of an estate in bankruptcy, there must be a division of the allowable fee, rather than a duplication or multiplication of fees.[167] In regard to the particular matter of the bankrupt's discharge, it has been ruled that, in voluntary proceedings, the bankrupt's attorney may be allowed a docket fee for filing the application for discharge if there is no contest. If there is a contest made by the trustee at the instance of creditors, which is unsuccessful, he may be given a larger allowance from the estate. But where an unsuccessful contest is made by one or more creditors, acting for themselves and not through the trustee as the representative of all, the question of costs should be treated as one arising inter partes, and the estate generally ought not to suffer from an ill-advised contest.[168]

§ 782. **Same; Attorney for Bankrupt.**—The statute provides for the allowance of "one reasonable attorney's fee for professional services actually rendered, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."[169] In determining the reasonable value

[162] In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641. In a proceeding in a court of bankruptcy to determine the amount to be allowed as a fee to the attorney of a creditor, out of such creditor's distributive share of the estate, a trial by jury may be allowed in the discretion of the court, but cannot be claimed as a matter of right, proceedings in bankruptcy being equitable in character. In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

[163] In re Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146; In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

[164] In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

[165] In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635; In re De Ran, 260 Fed. 732, 171 C. C. A. 470, 44 Am. Bankr. Rep. 409.

[166] In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; In re Iron Clad Mfg. Co., 215 Fed. 877, 132 C. C. A. 11, 33 Am. Bankr. Rep. 69.

[167] In re Coney Island Lumber Co., 199 Fed. 197, 29 Am. Bankr. Rep. 91.

[168] In re Keller, 207 Fed. 118, 31 Am. Bankr. Rep. 51.

[169] Bankruptcy Act 1898, § 64b. See

of services rendered to a bankrupt by his attorney, neither the assets nor the liabilities of the estate represent or measure the value of the matter involved,[170] but the allowance can be made only for the reasonable value of services actually required, irrespective of the services actually rendered;[171] that is, the attorney cannot claim compensation for all legal work he may do for the bankrupt in the proceedings, but only for that which the referee or the court may consider was required by the provisions of the law and the necessities of the particular case.[172] Further, it is necessary that the professional services should have been reasonably necessary to enable the bankrupt to discharge his duties under the law,[173] and that they should have conduced to the benefit of the estate or to its prompt, efficient, or economical administration.[174] And since the attorney's services must have been rendered to the bankrupt while he was "performing the duties prescribed," it follows that no fee can be allowed to the attorney if the bankrupt has not performed his statutory duties, or at least if it appears that he has actively endeavored to defeat or delay the proceeding.[175] But the fact that the bankrupt has disobeyed an order of the court requiring him to turn over money to his trustee, and has fled the jurisdiction and is in contempt, will not prevent the allowance of a proper fee to his attorney for services rendered in the course of the proceedings before the occurrence of the contempt, such misconduct on the part of the bankrupt having been without the attorney's privity or complicity.[176] The preparation of the bankrupt's petition and schedules is clearly a work necessary to enable him to perform his duties under the act, and a proper and moderate fee should be allowed to his attorney out of the estate for this work, both in voluntary and involuntary cases.[177] The amount is not to be determined by the mere clerical labor involved, for the proper preparation of a schedule

Smith v. Shenandoah Valley Nat. Bank of Winchester, Va., 246 Fed. 379, 158 C. C. A. 443, 40 Am. Bankr. Rep. 314. Where an alleged involuntary bankrupt successfully resists adjudication, he is entitled to have an attorney's fee taxed as part of the costs in his favor. In re Wise (D. C.) 212 Fed. 567. And see In re Weissbord (D. C.) 241 Fed. 516, 39 Am. Bankr. Rep. 243.

[170] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[171] In re Connell & Sons, 120 Fed. 846, 9 Am. Bankr. Rep. 474.

[172] In re Payne, 151 Fed. 1018, 18 Am. Bankr. Rep. 192.

[173] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[174] In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Rosenthal & Lehman, 120 Fed. 848, 9 Am. Bankr. Rep. 626.

[175] In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692.

[176] In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238.

[177] In re Fullick, 201 Fed. 463, 28 Am. Bankr. Rep. 634; In re Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Kennedy, Fed. Cas. No. 7,700; In re Thompson, 13 N. B. R. 300, Fed. Cas. No. 13,938; In re Mansfield, 6 Ben. 284, Fed. Cas. No. 9,048; In re Averill, 1 Nat. Bankr. News, 544. Compare In re Matthews, 97 Fed. 772, 3 Am. Bankr. Rep. 265.

in bankruptcy requires a special kind of skill and knowledge. The systematizing, arrangement, and condensation of the matter should be considered.[178] Yet where the work involves nothing that would be beyond the powers of any competent accountant, the fact that it was done by the bankrupt's attorney does not entitle him to charge, as against the estate, on a scale which would be strictly appropriate only for professional services properly so called.[179] And he is not entitled to a fee for posting up the bankrupt's books and making extra copies of the schedules.[180] It is said that a bankrupt is not ordinarily entitled to the aid and presence of his counsel when attending before the referee or court for the purpose of giving information or undergoing examination, and hence his attorney should not be allowed fees out of the estate for such attendance upon the bankrupt, unless it is shown that there was some unusual contingency making his assistance really necessary.[181] Nor is the attorney entitled to a fee for assisting in making good the bankrupt's claim to exemptions and procuring the setting apart of the same,[182] or for services rendered in proceedings to confirm a composition,[183] nor for his services in obtaining a judgment in favor of the bankrupt before the bankruptcy, though he may have a fee for collecting the judgment for the trustee.[184] Again, the allowance to the attorney should not include a fee for defending the bankrupt against charges of fraud or concealment of assets, or other matters involving his personal liability, civil or criminal.[185] And where the trustee in bankruptcy is opposing the allowance of a claim against the estate, as are also some of the bankrupt's creditors, the bankrupt's attorney is not entitled to assist in such proceeding at the expense of the estate.[186] As to the bankrupt's application for discharge, an allowance has generally been made to the attorney for his services in supporting the application, to the extent of a docket fee if there is no substantial opposition, which may be materially increased if opposition develops.[187] But the latest opinion appears

[178] In re Andrews, 11 N. B. R. 59, Fed. Cas. No. 370.

[179] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[180] In re Connell & Sons (D. C.) 120 Fed. 846, 9 Am. Bankr. Rep. 474.

[181] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749; In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187; In re Hammel (D. C.) 211 Fed. 238, 31 Am. Bankr. Rep. 672. But see In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Michel, 95 Fed. 803; In re Clark, 43 How. Prac. (N. Y.) 70, Fed. Cas. No. 2,803.

[182] In re O'Hara, 166 Fed. 384, 21 Am. Bankr. Rep. 508; In re Castleberry, 143 Fed. 1021, 16 Am. Bankr. Rep. 430; In re Bohrman (D. C.) 224 Fed. 287, 34 Am. Bankr. Rep. 801.

[183] In re Fogarty, 187 Fed. 773, 109 C. C. A. 621, 26 Am. Bankr. Rep. 568; In re Kinnane Co.'s Estate, 242 Fed. 769, 155 C. C. A. 357, 39 Am. Bankr. Rep. 593.

[184] In re Blum, 193 Fed. 304, 28 Am. Bankr. Rep. 60.

[185] In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185.

[186] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[187] In re Christianson, 175 Fed. 867,

to be that a contest over the discharge waged between certain individual creditors on the one side and the bankrupt on the other, and not conducted by the trustee as the representative of all the creditors, is a matter which should not involve the estate in liability for costs and fees, if the opposition proves unsuccessful.[188]

As to the allowance of a fee to the bankrupt's attorney in voluntary cases, since no conditions are attached to it in the statute, and it is merely directed to be "as the court may allow," it is held that the allowance of a fee in such cases and its amount rest entirely in the sound judicial discretion of the court of bankruptcy.[189] Generally, however, the attorney of a voluntary bankrupt may be allowed a fee, payable out of the estate, for such professional services as were necessary to enable the bankrupt to bring his case properly before the court, secure an adjudication and reference, surrender his estate, and perform his duties for the benefit of creditors, and receive his discharge if entitled thereto; and the fee is not necessarily to be restricted to such services as were specially beneficial to the estate or rendered primarily in its interest.[190] There can be no fixed fee for all cases, but the character and condition of the estate, the orders necessary to be secured for its protection, and the corresponding amount of time and attention required of the attorney, are all matters to be considered by the court in determining what is a reasonable amount in the circumstances.[191]

§ 783. Same; Attorneys for Petitioning and Other Creditors.—The court of bankruptcy is authorized to allow a reasonable fee to the attorney for the petitioning creditors in a case of involuntary bankruptcy, to be included in the costs of administration and paid out of the estate,[192] provided, of course, that an adjudication of bankruptcy is made on the petition, for if the debtor successfully resists it there can be

23 Am. Bankr. Rep. 710; In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187; In re Eidom, 3 N. B. R. 160, Fed. Cas. No. 4,315. But compare In re Brundin, 112 Fed. 306, 7 Am. Bankr. Rep. 296; In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450; Ex parte Hale, 5 Law Rep. 403, Fed. Cas. No. 5,910. See In re Hammel (D. C.) 211 Fed. 238, 31 Am. Bankr. Rep. 672.

188 In re Keller, 207 Fed. 118, 31 Am. Bankr. Rep. 51. See In re Gillardon, 187 Fed. 289, 26 Am. Bankr. Rep. 103.

189 In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559; In re O'Connell, 98 Fed. 83, 3 Am. Bankr. Rep. 422; In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296; In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641; In re Beck, 92 Fed. 889, 1 Am. Bankr. Rep. 535; In re Goodwin, 2 Nat. Bankr. News, 445.

190 In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187.

191 In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296.

192 Bankruptcy Act 1898, § 64b, cl. 3. And see In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re New York Mail S. S. Co., 7 Blatchf. 178, 3 N. B. R. 627, Fed. Cas. No. 10,208; In re King, 4 Biss. 319, Fed. Cas. No. 7,780; In re O'Hara, 3 Pittsb. (Pa.) 111, Fed. Cas. No. 10,465; In re Jones, 9 N. B. R. 491, Fed. Cas. No. 7,451; Miller v. Scott, 6 Phila. (Pa.)

no allowance to the creditors.[193] In case of an adjudication, the attorney for the creditors is entitled to this fee as of right, and its allowance or refusal is not a matter within the discretion of the court of bankruptcy.[194] But the amount to be allowed is a question for the exercise of a sound judicial discretion, and to be determined upon a consideration of the nature and character of the services rendered, but if the sum allowed is deemed excessive, it will be reduced on appeal or review.[195] The fee will have to be paid out of the general funds of the estate, and lien creditors cannot be required to bear the expense of it or contribute to it.[196] Further, it is to be considered as compensation for professional services actually rendered in and about the matter of securing an adjudication of bankruptcy. Petitioning creditors cannot be allowed, out of the estate, sums paid to their attorneys as retainers,[197] nor for services rendered in protecting their special and individual interests, but only for such as were for the common benefit of all the creditors.[198] If two separate petitions in involuntary bankruptcy are filed by different sets of creditors, the one fee allowable should go to the attorneys in that petition on which the adjudication is made,[199] and if the petitions are consolidated, the fee must be divided between them according to the relative value of the services and amount of work done by each.[200] It is the evident intention of the statute (and so the courts hold) to restrict

484, 2 N. B. R. 86, Fed. Cas. No. 5,620; Dundore v. Coates, 6 N. B. R. 304, Fed. Cas. No. 4,142; In re Mead, 8 Phila. (Pa.) 174, Fed. Cas. No. 9,364. In no event can more than one docket fee be taxed in any one bankruptcy proceeding. Peck v. Richter, 217 Fed. 880, 133 C. C. A. 590, 33 Am. Bankr. Rep. 11. Services for which an attorney's fee is to be allowed in involuntary bankruptcy include such only as are proper professional services, not including conferring with creditors to induce them to join in the petition. In re Sage (D. C.) 225 Fed. 397, 35 Am. Bankr. Rep. 625. The court of bankruptcy should not be called upon to settle differences between counsel for the petitioning creditors as to what proportion to the total sum allowed them jointly each should receive. Hall v. Reynolds, 231 Fed. 946, 146 C. C. A. 142, 36 Am. Bankr. Rep. 721.

[193] In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653. Counsel fees for resisting the adjudication should not be allowed to the attorney for the minority stockholders in the bankrupt corporation, who, by holding the offices, were enabled to have the adjudication resisted in their interest. In re Murphy Boot & Shoe Co. (D. C.) 242 Fed. 991, 39 Am. Bankr. Rep. 811.

[194] In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

[195] In re Williams (D. C.) 240 Fed. 788; In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; In re Sanger, 5 N. B. R. 54, Fed. Cas. No. 12,318. As to the elements to be taken into consideration in making an allowance to attorneys for the petitioning creditors, see In re Weissman (D. C.) 267 Fed. 588, 46 Am. Bankr. Rep. 189.

[196] In re Freeman (D. C.) 190 Fed. 48, 27 Am. Bankr. Rep. 16; In re Gillaspie, 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Allert (D. C.) 173 Fed. 691, 23 Am. Bankr. Rep. 101.

[197] In re Comstock, 9 N. B. R. 88, Fed. Cas. No. 3,075.

[198] In re Mead, 8 Phila. (Pa.) 174, Fed. Cas. No. 9,364.

[199] In re Southern Steel Co., 169 Fed. 702, 22 Am. Bankr. Rep. 476; Frank Dickey, 139 Fed. 744, 71 C. C. A. 562, 15 Am. Bankr. Rep. 155.

[200] In re McCracken & McLeod, 129 Fed. 621, 12 Am. Bankr. Rep. 95.

this statutory fee to the services of attorneys rendered in preparing and presenting the petition and securing the adjudication. The "petitioning creditors" are to be considered as occupying the position of petitioning creditors only at this stage of the proceedings. Services rendered to them either before or after are not rendered to them in the character of "petitioning creditors," and are therefore not within this special provision of the act. No allowance can be made out of the estate to the creditors who presented the petition for services of an attorney rendered after the appointment of the trustee, as, in examining the bankrupt, sending out notices, attending sales, or the like, for such services are either for the benefit of the trustee or of the creditors individually.[201] But where the attorney for the petitioning creditors, concurrently with the petition or directly after it, prepared and presented a petition for an injunction restraining a mortgage trustee of the bankrupt from disposing of the property affected pendente lite, it was considered that he might be allowed a fee for this service.[202]

As a general rule, and aside from the special provisions for compensating the attorneys for petitioning creditors, it may be said that counsel employed by creditors of a bankrupt to represent them in the bankruptcy proceedings must look to their clients for compensation, and not to the estate of the bankrupt or to the court.[203] And especially, where professional services are rendered for the benefit of a particular creditor, and not for all the creditors of the estate, or where they are in opposition to the interests of the general creditors, they cannot be compensated out of the estate in bankruptcy.[204] Still, where the attorney for a particular creditor succeeds in an undertaking which materially benefits the estate as a whole, as, in unearthing concealed assets or recovering property fraudulently transferred, he may be allowed a reasonable fee out of the estate, for though he may have acted primarily in the interest of his own client, yet the result inures to the benefit of all. This is specially provided for in the bankruptcy act as amended,[205] and is also a doctrine generally recognized by the courts.[206] But there must have been professional service actually rendered. Thus, where notes of the bankrupt

[201] In re Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Comstock, 9 N. B. R. 88, Fed. Cas. No. 3,075; In re Munford (D. C.) 255 Fed. 108, 43 Am. Bankr. Rep. 218.

[202] In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

[203] In re Evans, 116 Fed. 909, 8 Am. Bankr. Rep. 730; Mechanics'-American Nat. Bank v. Coleman, 204 Fed. 24, 29 Am. Bankr. Rep. 396; In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559.

[204] In re Baxter, 28 Fed. 452; In re Hope Min. Co., 2 Sawy. 351, 7 N. B. R. 598, Fed. Cas. No. 6,682; In re Shoemaker, 205 Fed. 113, 123 C. C. A. 345, 30 Am. Bankr. Rep. 349.

[205] Bankruptcy Act 1898, § 64b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 800.

[206] In re Medina Quarry Co. (C. C. A.) 191 Fed. 815, 27 Am. Bankr. Rep. 466; In re E. I. Fidler & Son, 172 Fed. 632, 23 Am. Bankr. Rep. 16; In re Medina Quarry Co., 182 Fed. 508, 25 Am. Bankr. Rep.

are placed in the hands of an attorney for collection before maturity, but are paid in due course of the bankruptcy proceedings and without suit, the holder is not entitled to an allowance for attorney's fees thereon.[207] And where proceedings for the recovery of property concealed or fraudulently transferred have been instituted by the trustee, who is represented therein by competent counsel, it is not the privilege of creditors to have their own counsel assist in such proceedings, and if they do, they are not entitled to fees out of the estate.[208] So the court will not be justified either under the statutory provision above referred to or under its general equity powers, in charging the estate with fees to be allowed to attorneys for creditors, where the services rendered consisted in opposing the allowance of improper or fictitious claims against the estate, or securing their expunction after allowance, or defeating claims to priorities,[209] unless, possibly, in cases where the trustee in bankruptcy has refused to make defense against such claims or to take the proper steps to defeat them.[210] It should also be remarked that, where a creditor claims priority of payment out of the estate of the bankrupt, on the ground of his having a lien on particular property, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy and secures its allowance, though he cannot of course claim a fee out of the estate, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property.[211]

§ 784. Same; Attorney for Receiver.—The duties of a receiver in bankruptcy are ordinarily not such as to require the advice or assistance of an attorney, and he is not justified in retaining counsel and charging his fees against the estate, in the absence of an order of court authorizing the employment of the attorney,[212] or in the absence of a showing that the services of the attorney were distinctly beneficial to the estate

405; Smith v. Cooper, 120 Fed. 230, 56 C. C. A. 578, 9 Am. Bankr. Rep. 755; In re Evans, 117 Fed. 574.

[207] In re Jenkins, 192 Fed. 1000, 27 Am. Bankr. Rep. 860.

[208] In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185. But see In re Atkins (D. C.) 225 Fed. 639, 34 Am. Bankr. Rep. 794.

[209] In re Medina Quarry Co. (C. C. A.) 191 Fed. 815, 27 Am. Bankr. Rep. 66; In re George Watkinson & Co., 130 Fed. 218, 12 Am. Bankr. Rep. 370; In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

[210] In re Roadarmour, 177 Fed. 379, 100 C. C. A. 611, 24 Am. Bankr. Rep. 49; In re Little River Lumber Co., 101 Fed. 558.

[211] In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319. And see In re Hershberger, 208 Fed. 94, 30 Am. Bankr. Rep. 635.

[212] In re Leonard, 177 Fed. 503, 24 Am. Bankr. Rep. 97; In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73; In re Union Bank, 37 N. J. Eq. 420. And see supra, § 216.

as such.[213] Further, since a receiver in bankruptcy is required to stand independent of the parties to the litigation, the rule has been laid down that he will not be allowed to charge the estate for services rendered to him by the attorney for either party during the continuance of such relation.[214] Thus, where the attorneys for the receiver were also actively engaged throughout a protracted contest in bankruptcy, as attorneys for the petitioning creditors, and were not independent counsel employed by the receiver, as contemplated by an order granting leave to the receiver to employ counsel, and the bankruptcy proceeding was afterwards dismissed, it was held that the court rightly declined to make any allowance to the attorneys for services rendered to the receiver, such expenses being properly chargeable against the petitioning creditors.[215] Perhaps this rule should be modified in particular cases, where it is possible to distinguish clearly between services rendered to the receiver and services rendered to some other client. But at any rate, where attorneys for the receiver are also attorneys for the moving creditors and for the trustee, they are not entitled to charge the receiver for services performed in obtaining his appointment, or for other matters preliminary thereto, which services were rendered, not to the receiver, but in the interest of moving creditors, but only for services rendered to the receiver as such.[216] It should be added that the number of attorneys employed by a receiver in bankruptcy is not an element to be considered in allowing fees, but the allowance should be made as though but one attorney had been employed.[217]

§ 785. **Same; Attorney for Trustee.**—A trustee in bankruptcy may retain an attorney to advise and assist him, not unnecessarily or as a mere matter of course, but when the condition of the estate is such that he cannot safely or wisely proceed with its collection and distribution except under the guidance of competent professional advice; and for services thus rendered to a trustee in bankruptcy, in so far as the same were exclusively for his benefit or for the benefit of the estate which he represents, and were proper or necessary, and called for the exercise of professional knowledge and skill, as distinguished from mere clerical labor or business intelligence, the attorney is entitled to a reasonable fee, to be fixed by the court and paid out of the estate.[218] A trustee in bankruptcy who is also an attorney cannot recover for legal services performed for the petitioning creditors or for the bankrupt, since one who ac-

[213] Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214.

[214] In re Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

[215] In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

[216] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718.

[217] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718.

[218] See supra, § 309.

cepts the position of trustee of a bankrupt's estate renounces the right to compensation in any other form or guise, and all services rendered must be referred to his position as trustee; but such a trustee may recover for services properly chargeable against the estate which were rendered prior to his appointment as trustee.[219] An allowance of compensation to counsel for the trustee in bankruptcy covering ordinary services does not necessarily preclude an additional allowance for subsequent unexpected and extraordinary services made necessary by the filing of a doubtful claim.[220] Attorneys' fees and expenses incurred in vacating a preference made by the bankrupt to a particular creditor will be paid out of funds recovered for the benefit of the general creditors.[221]

[219] Holland v. McIlwaine, 223 Fed. 777, 139 C. C. A. 597, 34 Am. Bankr. Rep. 416.

[220] In re Metallic Specialty Mfg. Co. (D. C.) 215 Fed. 937.

[221] In re Stearns Salt & Lumber Co., 225 Fed. 1, 140 C. C. A. 461, 35 Am. Bankr. Rep. 264.

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[216] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718.

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[219] Holland v. McIlwaine, 223 Fed. 777, 139 C. C. A. 597, 34 Am. Bankr. Rep. 416.

[220] In re Metallic Specialty Mfg. Co. (D. C.) 215 Fed. 937.

[221] In re Stearns Salt & Lumber Co., 225 Fed. 1, 140 C. C. A. 461, 35 Am. Bankr. Rep. 264.

CHAPTER XXXVII

CRIMES AND CRIMINAL PROCEDURE

§ 786. Persons Liable.—The bankruptcy act provides that the word "persons," "when used with reference to the commission of acts which are herein forbidden, shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies, of corporations."[1] Notwithstanding the broad nature of this provision, it was held in some of the earlier cases not to limit or affect the twenty-ninth section of the act, in which criminal offenses are defined and denounced, the rule of strict construction of criminal statutes forbidding such application. And particularly in relation to the offense of fraudulently concealing assets from the trustee, it was held that, where the bankrupt was a corporation, but its officers were not individually in bankruptcy, they could not be indicted for concealing the bankrupt's property or assets.[2] But these decisions have been disapproved, and the doctrine now prevailing is that a bankrupt corporation may be guilty of the offense of concealing assets, that its president or any other officer, though not himself a bankrupt, may be indicted and punished for that offense if he brought about the concealment or participated therein or conspired with others to effect it, and that it is immaterial that the corporation is not or cannot be indicted for the same offense or as one of the conspirators.[3] Further, an indictment may be sustained against the president or other managing officer of a bankrupt corporation for the offense of knowingly and fraudulently aiding and abetting it in the concealment of its assets from its trustee.[4] And on a similar principle, a member of a

[1] Bankruptcy Act 1898, § 1, clause 19.

[2] Field v. United States, 137 Fed. 6, 69 C. C. A. 568, 14 Am. Bankr. Rep. 507; United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270.

[3] Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113, 19 Am. Bankr. Rep. 8; United States v. Freed, 179 Fed. 236, 25 Am. Bankr. Rep. 89; Wolf v. United States, 238 Fed. 902, 152 C. C. A. 36, 39 Am. Bankr. Rep. 107.

[4] Crim. Code U. S., §§ 332, 335; Kauf-

bankrupt partnership, though not himself adjudged bankrupt, is subject to prosecution for the fraudulent concealment of property of the partnership from its trustee.[5]

§ 787. **Concealment of Property by Bankrupt.**—It is a punishable offense if a person shall have knowingly and fraudulently "concealed, while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy."[6] Under the act of 1867, it was held that this offense is committed if the bankrupt fraudulently omits from his schedule any property or effects which should have been listed, with the intention of concealing such property.[7] But the modern doctrine is that the offense consists of a continuous concealment during the whole course of the bankruptcy proceedings, and even beyond, or until discovery, and that the crime may be initiated, but is not necessarily consummated, by the fraudulent omission of property from the schedule.[8] Undoubtedly the failure to list property is a significant circumstance, but since the concealment must have been "knowingly and fraudulently" perpetrated, a mere omission through mistake or accident is not sufficient.[9] But the fact that the bankrupt used a part of the proceeds of property which he had concealed from his trustee in the payment of debts does not negative a fraudulent intent in such concealment.[10] The concealment must have taken place while the defendant was a bankrupt or after his discharge. Hence if a person begins to secrete or cover up his property in expectation of coming bankruptcy and with the intention of withholding it from administration in bankruptcy, it is not yet an offense under the statute, because not done "while a bankrupt." If such a scheme is pursued and carried on into the bankruptcy proceedings, after the defendant's adjudication, it would come under the denunciation of the statute.[11] But if all of the

man v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

[5] Conetto v. United States, 251 Fed. 42, 163 C. C. A. 292, 42 Am. Bankr. Rep. 189.

[6] Bankruptcy Act 1898, § 29b. As respects the bankrupt's offense of knowingly and fraudulently concealing, while a bankrupt, given property from his trustee, it is immaterial whether his bankruptcy was voluntary or involuntary. Tugendhaft v. United States (C. C. A.) 263 Fed. 562, 45 Am. Bankr. Rep. 310.

[7] United States v. Clark, 1 Low. 402, Fed. Cas. No. 14,806.

[8] Gretsch v. United States, 231 Fed. 57, 145 C. C. A. 245, 36 Am. Bankr. Rep. 571; Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194; 20 Am. Bankr. Rep. 724; Kern v. United States, 169 Fed. 617, 95 C. C. A. 145, 22 Am. Bankr. Rep. 223.

[9] In re Scott (D. C.) 6 Sawy. 234, 11 Fed. 133.

[10] Corenman v. United States, 188 Fed. 424, 110 C. C. A. 341. And see United States v. Lowenstein (D. C.) 126 Fed. 884, 11 Am. Bankr. Rep. 134. That a bankrupt knowingly and fraudulently conceals assets from his trustee is an offense under the statute, although he has disposed of the property before being ordered to turn it over to the trustee. In re Stern (D. C.) 215 Fed. 979.

[11] Glass v. United States, 231 Fed. 65,

bankrupt's acts, alleged to constitute concealment of property from his trustee, occurred before the filing of the petition in bankruptcy, the indictment cannot be sustained.[12] Next it is necessary that the property should have been concealed "from his trustee." But it is held that the concealment of property by a voluntary bankrupt, after his adjudication, though before the appointment of a trustee, is a concealment from the trustee, which, if knowingly and fraudulently done, will constitute a criminal offense.[13] To sustain an indictment under this provision of the statute, it is of course essential to allege and show that a trustee was actually appointed.[14] But it is held that the offense of conspiring to conceal a bankrupt's property from his trustee (altogether a different offense) may be committed although it is not shown that a trustee was ever appointed, as in a case where, by the carrying out of the conspiracy, all the bankrupt's property was removed out of the jurisdiction of the court before the adjudication in bankruptcy, so that the appointment of a trustee would have been a useless formality.[15] After a successful concealment of assets has been practised, and an indictment found against the bankrupt therefor, he cannot purge himself of his criminal liability by filing an amended schedule, setting forth the assets alleged to have been concealed. Such conduct may properly influence the court in determining the measure of punishment after conviction, but does not render the bankrupt any the less guilty of the statutory offense.[16] Finally, it is to be observed that, although the offense may be committed after the discharge of the bankrupt, it can be committed only with respect to property which was a part of his estate and should have been turned over to the trustee.[17] What the bankrupt may earn or acquire after the filing of the petition is not a part of his estate, and he is not bound to disclose it to his trustee. Hence it is not a vio-

145 C. C. A. 253, 36 Am. Bankr. Rep. 550; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22; United States v. Rhodes (D. C.) 212 Fed. 513.

[12] Warren v. United States, 199 Fed. 753, 118 C. C. A. 191, 43 L. R. A. (N. S.) 278, 29 Am. Bankr. Rep. 555.

[13] United States v. Goldstein (D. C.) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

[14] The fact that the trustee appointed for a bankrupt failed to give bond, but continued to act as trustee, and there was no declaration of a vacancy, is no defense to a prosecution of the bankrupt for a fraudulent concealment of property. Sharfsin v. United States (C. C. A.) 265 Fed. 916, 46 Am. Bankr. Rep. 1.

[15] Radin v. United States, 189 Fed. 568, 111 C. C. A. 6, 25 Am. Bankr. Rep. 640.

[16] Kern v. United States, 169 Fed. 617, 95 C. C. A. 145, 22 Am. Bankr. Rep. 223.

[17] Where a partner appropriated firm assets, with the concurrence of his copartners, the assets so withdrawn, upon his bankruptcy individually and as a member of the firm, was "property belonging to his estate in bankruptcy" within the criminal provisions of the act. Malvin v. United States, 252 Fed. 449, 164 C. C. A. 373, 42 Am. Bankr. Rep. 98.

lation of the statute for the bankrupt to withhold or secrete from his trustee such after-acquired property.[18]

§ 788. **Making False Oath or Account.**—It is a punishable offense if any person shall have knowingly and fraudulently "made a false oath or account in, or in relation to, any proceeding in bankruptcy." [19] One guilty of false swearing in a bankruptcy proceeding must be prosecuted under this provision of the Bankruptcy Act, instead of under Penal Code, § 125, which is the general statute applicable to prosecutions for perjury, for the Bankruptcy Act provides a lighter punishment and a shorter period of limitations than the general statute, and the rule applies that for one offense there can be only one prosecution and conviction.[20] The offense denounced by the statute is of course not restricted to the bankrupt himself. The offense might be committed and the penalty incurred, for instance, by strangers examined as witnesses in the proceedings, or by creditors proving claims or filing sworn statements as to the nature and value of securities held, etc.,[21] or by the trustee in bankruptcy in respect to the verity of his accounts filed in the proceeding. But practically this provision of the act is most frequently invoked against the bankrupt. And it is held to be within the statute if he intentionally, and with a fraudulent purpose, omits from his schedule of assets (which must be sworn to) any material amount of property which should have been included,[22] but not where he fairly submitted the facts to his counsel, and, acting on advice then received, withheld a certain item from the schedule,[23] and probably not where the item omitted was of very doubtful value or where the bankrupt's title to it was doubtful in law.[24]

This provision of the statute applies also to any false testimony which may be given by the bankrupt on his examination before the referee.[25] And an indictment for perjury which alleges that the ac-

[18] In re Polakoff, 1 Nat. Bankr. News, 232.

[19] Bankruptcy Act 1898, § 29b.

[20] Rosenthal v. United States, 248 Fed. 684, 160 C. C. A. 584, 41 Am. Bankr. Rep. 583. See Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

[21] Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127, 34 Am. Bankr. Rep. 143. And see Lybrand v. United States (C. C. A.) 269 Fed. 601, 46 Am. Bankr. Rep. 469.

[22] United States v. Nihols, 4 McLean, 23, Fed. Cas. No. 15,880.

[23] United States v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847. And see Levinson v. United States (C. C. A.) 263 Fed. 257, 45 Am. Bankr. Rep. 305.

[24] In re Shoemaker, 4 Biss. 245, Fed. Cas. No. 12,799.

[25] United States v. Coyle (D. C.) 229 Fed. 256; Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1. A bankrupt who, on examination in a bankruptcy proceeding, in answer to a question requiring a statement of his assets, willfully fails to disclose all of such assets, is guilty of making a false oath under this provision of the statute. United States v. Gray (D. C.) 255 Fed. 98, 43 Am. Bankr. Rep. 158.

cused gave false testimony before the referee in bankruptcy, is sustained by evidence that the hearing at which the accused testified was had in the referee's office, that the referee administered the oath to the accused as a witness, and personally conducted part of the examination, while the rest was conducted by counsel, that all the testimony was taken by a stenographer, and that the referee was at all times in the same room, or in an adjacent or adjoining room, in the absence of anything to show that the referee was not within the hearing of the examination at all times, as against the objection that the perjury was not committed before the referee in person, based on the statement of the stenographer, deduced from signs in her notes, that the referee was out of the room part of the time, but without any independent recollection on her part that such was the case.[26] It is also held that since the statute relates to false swearing in any "proceeding in bankruptcy," the offense here denounced may be committed by the bankrupt on his examination before the referee on an investigation of specifications filed in opposition to his application for discharge.[27]

§ 789. **Receiving Property from Bankrupt.**—Among the offenses denounced by the bankruptcy act is that committed by any person who shall have "knowingly and fraudulently * * * received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act."[28] The essential elements of the offense are that the accused should have received property from the bankrupt (which implies the complicity of the latter), that the property should be of substantial or material value, that the transfer should have been made after the filing of the petition in bankruptcy, that the transferee should have knowledge of the bankruptcy proceedings, and that the intention of the transferee (and necessarily of the bankrupt also) should be to defeat the operation of the bankruptcy act by withholding the property in question from administration under it. Prosecutions under this provision of the act do not appear to have been frequent. But attention may be called to a case in which, after the filing of a petition in bankruptcy, the bankrupt surrendered valuable mortgaged property to the trustee in the mortgage, the latter taking possession, and both were fined by the court of bankruptcy, as for contempt.[29]

§ 790. **Extortion.**—The bankruptcy act makes it a crime for any person to have "extorted or attempted to extort any money or property

[26] Kovoloff v. United States (C. C. A.) 202 Fed. 475, 28 Am. Bankr. Rep. 767.

[27] Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649; In re Kretsch, 172 Fed. 523, 22 Am. Bankr. Rep. 284.

[28] Bankruptcy Act 1898, § 29b, cl. 4.

[29] In re Arnett, 112 Fed. 770, 7 Am. Bankr. Rep. 522.

from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."[30] It is said that "the ordinary meaning of the word 'extortion' is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. * * * The word has acquired a technical meaning in the common law, and designates a crime committed by an officer of the law, who, under color of his office, unlawfully and corruptly takes any money or thing of value that is not due him, or more than is due, or before it is due. The officer must unlawfully and corruptly receive such money or article of value for his own benefit or advantage."[31] Undoubtedly the provision above quoted would apply to those acting as officers in bankruptcy proceedings, and in addition, the federal laws make it a punishable offense for any officer of the United States to practise extortion upon any one, or to ask or receive any money or thing of value "with intent to have his decision or action on any question, matter, cause, or proceeding which may, at any time, be pending, or which may be by law brought before him in his official capacity, or in his place of trust or profit, influenced thereby."[32]

But extortion is not necessarily confined to those acting in an official capacity. It seems plain that the offense denounced by the statute might be committed by a creditor who should exact and receive a pecuniary reward for assenting to a composition or forbearing to oppose the bankrupt's application for discharge. But there is room for doubt as to whether the statute would apply to action or forbearance to act in respect to the institution of the bankruptcy proceedings. If a creditor, for instance, hearing that bankruptcy proceedings against his debtor were threatened or contemplated, should demand and receive something over and above the payment of his own debt as a consideration for his forbearing to join in the proposed petition, it is doubtful whether he would commit a punishable offense. The natural import of the language of the act, "acting or forbearing to act in bankruptcy proceedings," is that there must be a bankruptcy proceeding in existence or pending, in reference to which the action or non-action takes place. It could hardly be satisfied by a bankruptcy proceeding merely contemplated and which may not be instituted at all. And it has been held that, before any proceeding in bankruptcy has been commenced, a creditor may take from a third person a contract or security for the payment of money, as an inducement to forbear instituting proceedings against

[30] Bankruptcy Act 1898, § 29b, cl. 5.

[31] United States v. Deaver, 14 Fed. 595.

[32] Rev. Stat. U. S. §§ 5449, 5451, 5481, 5501.

the debtor, without violating any provision of the bankruptcy law or contravening public policy.[33]

But where the attorney for a trustee in bankruptcy at first took the course of arguing before the referee against the acceptance of a bid which had been made for the bankrupt's stock, on the ground that it was inadequate, and then compelled the bidder to pay him a sum of money in consideration of his changing his position and advising the referee to accept the bid, it was held that he was guilty of the offense of extortion under the bankruptcy act, and no defense could be found in the fact that he was legitimately entitled to use his influence and persuasion with the trustee or the referee.[34]

§ 791. Conspiring with Bankrupt.—This is not directly made a punishable offense by the terms of the bankruptcy act, though there is a reference in the statute to persons who are "participants" in any of the acts forbidden by the law.[35] But elsewhere it is provided that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty" and to imprisonment.[36] And under this statute it has been held that persons may be indicted for conspiring with a bankrupt to commit the acts made criminal by the bankruptcy law, although no one but the bankrupt himself is mentioned in that connection.[37] Thus, concealment of assets from the trustee in bankruptcy is an offense which can be committed only while there is a person in bankruptcy, and with his participation, but when it is so committed, not only the bankrupt is punishable, but also any others who aid and abet in the concealment.[38] But since the statute does not make it a criminal offense for a person not a bankrupt to conceal the bankrupt's property from the trustee, an indictment does not state an offense when it charges that the defendants, who were not in any manner officially connected with the bankrupt corporation, either as directors or stockholders, conspired to conceal assets of the corporation from the trustee in bankruptcy (that is, conspired with each other, but not with the bankrupt or its officers), and in pursuance of such conspiracy removed the corporation's stock

[33] Ecker v. Bohn, 45 Md. 278, 16 N. B. R. 544. And see, supra, §§ 157, 158.

[34] United States v. Dunkley (D. C.) 235 Fed. 1000, 38 Am. Bankr. Rep. 127.

[35] Bankruptcy Act 1898, § 1, cl. 19.

[36] Rev. St. U. S. § 5440.

[37] United States v. Bayer, 4 Dill. 407, 13 N. B. R. 400, Fed. Cas. No. 14,547.

[38] United States v. Young & Holland Co., 170 Fed. 110, 22 Am. Bankr. Rep. 484; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

of goods from its place of business and sold the same and concealed the proceeds.[39]

§ 792. **Offenses by Referees and Trustees.**—Referees in bankruptcy are forbidden to act officially in any case in which they are directly or indirectly interested, to purchase, directly or indirectly, any property of an estate in bankruptcy under their jurisdiction as referees, or to refuse to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in their charge by parties in interest when directed by the court so to do. In either of these three cases, the offense must have been committed "knowingly." In either case, the punishment, upon conviction, is a fine of not more than five hundred dollars and forfeiture of the office of referee.[40] In regard to the second offense above named, it may be remarked that the prohibition of the statute would apply to a purchase by a referee, otherwise fair, at a public sale made by the trustee, as well as to a purchase by private sale from the trustee or from the bankrupt.

As to trustees in bankruptcy, the provision is that "a person shall be punished by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee."[41] It should be remarked that this offense exists solely by virtue of the bankruptcy act. Independently of that statute, there is no law of the United States providing for the punishment of a trustee in bankruptcy for the embezzlement of funds coming into his hands as trustee.[42] As in the case of a referee, so also in the case of a trustee, it is a punishable offense to refuse parties in interest a reasonable opportunity to inspect the accounts, papers, and records of estates in bankruptcy committed to their charge, at least when directed by the court so to do, and in the case of the trustee, also, the penalty includes forfeiture of his office.[43]

§ 793. **Jurisdiction.**—The courts of bankruptcy are invested with jurisdiction to "arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States."[44] The

[39] United States v. Waldman, 188 Fed. 524, 26 Am. Bankr. Rep. 677.

[40] Bankruptcy Act 1898, § 29c.

[41] Bankruptcy Act 1898, § 29a.

[42] United States v. Bixby, 10 Biss. 238, 6 Fed. 375.

[43] Bankruptcy Act 1898, § 29c.

[44] Bankruptcy Act 1898, § 2, cl. 4.

bankruptcy act also gave to the circuit courts of the United States "concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."[45] But since the abolition of the circuit courts by the Federal Judicial Code of 1911, this provision has become unimportant. Where a state statute makes it a punishable offense, under certain circumstances, for an insolvent debtor to conceal his property, the proper state court is not deprived of jurisdiction to try and punish a person violating the statute by the fact that he afterwards becomes bankrupt and thereupon becomes liable to punishment under the bankruptcy act in respect to the same concealment of property.[46]

§ 794. Indictment or Information.—It was evidently the understanding and intention of Congress that offenses against the bankruptcy law might be prosecuted by information, since that provision of the act which limits the time within which prosecutions may be brought bars criminal proceedings "unless the indictment is found or the information is filed in court within one year after the commission of the offense."[47] But the offenses denounced by the act (except those which may be committed by referees or trustees in their official capacity) are punishable by imprisonment which may exceed one year in duration, and therefore, under section 335 of the Criminal Code of 1909, must be classed as felonies, and must be prosecuted by indictment.[48]

In any prosecution under the act the first essential to be pleaded and proved is the adjudication in bankruptcy. Hence it is ruled that the indictment must set forth the proceedings in the court of bankruptcy with such particularity as to show affirmatively that an adjudication of bankruptcy was made in a case in which the court, describing it, had jurisdiction.[49] And an indictment which does not state the name of the court or the time or place where the proceedings were instituted is not sufficient.[50] But it is not necessary to set forth in detail the petition in bankruptcy on which the adjudication was made, but only to refer to it

Only the court where the positive act of converting or retaining the physical property was done has jurisdiction of the offense of fraudulently concealing property from the trustee in bankruptcy; hence the court in which the petition in bankruptcy was filed has no jurisdiction of the offense of concealing property which was never within the district. Gretsch v. United States, 231 Fed. 57, 145 C. C. A. 245, 36 Am. Bankr. Rep. 571.

[45] Bankruptcy Act 1898, § 23c.

[46] State v. Thompson, 58 N. H. 270.

[47] Bankruptcy Act 1898, § 29d.

[48] Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C. 466, 32 Am. Bankr. Rep. 22.

[49] United States v. Prescott, 2 Biss. 325, Fed. Cas. No. 16,084.

[50] United States v. Latorre, 8 Blatchf. 134. Fed. Cas. No. 15,567. But see United States v. Deming, 4 McLean, 3. Fed. Cas. No. 14,945, holding an indictment for perjury in a proceeding in bankruptcy sufficient in alleging the petition as made "to a judge sitting as a bankrupt court."

in such a manner as to show its character and object.[51] And as an indictment need not ordinarily negative an exception, the jurisdiction of the court to make an adjudication in bankruptcy against the corporation in question may be sufficiently alleged without a particular averment that it was one of the classes of corporations made subject to the bankruptcy law.[52] And in fact, it has been held sufficient simply to allege that the defendant "was lawfully adjudged a bankrupt." [53]

In regard to the offense of concealing assets from the trustee, it is said that the word "conceal" is of plain import, and when coupled in an indictment with the words "unlawfully, knowingly, and fraudulently" clearly excludes unintentional acts; that, as the provisions of the statute relating to this offense set forth all the elements of the offense, an indictment in the words of the statute is sufficient; and that the particular manner of concealment of the property in question need not be described in the indictment, as this is a matter of evidence and not of pleading.[54] It is of course necessary to plead the time of the concealment, sufficiently to show that it occurred while the defendant was in bankruptcy or after his discharge. But it is held that it may be laid as of any date when the concealment continues, and hence it is proper to charge the commission of the offense as of the date when the bankrupt refused to turn over the property in question to the trustee.[55] The ownership of the property must be alleged. But an averment that the defendant concealed property "which then and there belonged to the estate in bankruptcy" sufficiently alleges the ownership of the property, and is not rendered insufficient or uncertain by the further averment that the property was "then and there the personal property of" the bankrupt, which must be construed in conjunction with the prior averment, or, even if the two averments must be regarded as repugnant, the latter may be rejected as surplusage.[56] So, where the indictment alleged the concealment, some months after the adjudication, of property "all then and there the property of him the said bankrupt," it was held that the failure to allege specifically that the property concealed was the property of the bankrupt at the time of the adjudication was a defect of form only, and not of substance.[57] And an averment that the

[51] United States v. Deming, 4 McLean, 3, Fed. Cas. No. 14,945.

[52] United States v. Freed, 179 Fed. 236, 25 Am. Bankr. Rep. 89.

[53] United States v. Crane, 3 Cliff. 211, Fed. Cas. No. 14,887.

[54] United States v. Comstock, 161 Fed. 644, 20 Am. Bankr. Rep. 520; Meyer v. United States, 220 Fed. 822, 136 C. C. A. 432, 33 Am. Bankr. Rep. 877; United States v. Greenbaum (D. C.) 252 Fed. 259, 42 Am. Bankr. Rep. 286; United States v. Rhodes (D. C.) 212 Fed. 513.

[55] United States v. Stern, 186 Fed. 854, 26 Am. Bankr. Rep. 110.

[56] United States v. Comstock, 161 Fed. 644, 20 Am. Bankr. Rep. 520. See United States v. Rosenstein (D. C.) 211 Fed. 738, 33 Am. Bankr. Rep. 730.

[57] United States v. Jackson, 2 Fed. 502.

bankrupt "unlawfully, knowingly, willfully, and fraudulently" concealed the property carries with it a sufficient averment of his knowledge that such property belonged to his estate in bankruptcy.[58] And it is not an essential element of this offense, such as must be averred in the indictment, that the bankrupt at the time of concealing the property knew either the fact that a trustee had been appointed for his estate or the name of the trustee.[59]

As to the offense of making a false oath in bankruptcy by swearing to a schedule of assets known to be false or incomplete, the indictment must allege the facts concerning the omission or understatement of assets sufficiently to show the materiality of the false statement, but need not expressly aver that it was material.[60] The particular property claimed to have been fraudulently and knowingly omitted from the schedule must be described in the indictment, but an allegation that it consisted of "one hundred and fifty thousand dollars in lawful money of the United States" is sufficiently specific.[61] But it will not do to allege that the bankrupt knew that his schedule was false and that he knew that he was the owner of a specified sum of money in addition to what was mentioned in the schedule. It is not the bankrupt's knowledge that is in question in this averment, but the fact itself. Hence the indictment must charge directly that he did have other property than that listed in the schedule.[62]

In an indictment for perjury committed in an examination or other proceeding in bankruptcy, if it is founded on the general provision of the federal criminal law as to perjury,[63] it is essential to allege that the false oath was taken "willfully," and the omission of this word is a fatal defect.[64] But where the alleged perjury consists in not giving a full and true account of his property by the bankrupt, the items on the schedule need not be set out in the indictment.[65] And an indictment is sufficient which, after alleging the prior proceedings and that an examination of the bankrupt was held and that he was sworn to make true answers, avers that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss.[66] So an indictment which charges that defendant committed perjury when he

[58] McNiel v. United States (C. C. A.) 150 Fed. 82, 18 Am. Bankr. Rep. 18.

[59] United States v. Comstock, 161 Fed. 644, 20 Am. Bankr. Rep. 520.

[60] United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270. And see United States v. Coyle (D. C.) 229 Fed. 256; Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127, 34 Am. Bankr. Rep. 143.

[61] United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270.

[62] Bartlett v. United States, 106 Fed. 884, 46 C. C. A. 19, 5 Am. Bankr. Rep. 678.

[63] Rev. Stat. U. S. § 5392, U. S. Comp. Stat. 1901, p. 3653.

[64] United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270.

[65] United States v. Chapman, 3 McLean, 390, Fed. Cas. No. 14,784.

[66] United States v. Crane, 3 Cliff. 211, Fed. Cas. No. 14,887.

swore that his books were burned on a certain day in April; that instead of being burned on that day they were in existence and in his possession as late as November following; and that he knew that he was making a false oath when he swore that they were burned in April, is good and sufficient, the defects, if any, being merely in matter of form not prejudicial to the defendant.[67] But where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustee alleged, as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the trustee, but did not allege any of the circumstances under which the goods were removed, so as to show that the removal was illegal and not under legal process, it was held insufficient.[68]

§ 795. **Burden of Proof and Evidence.**—In a prosecution of a bankrupt for the offense of concealing assets from his trustee, the burden is on the government to establish the defendant's guilt beyond a reasonable doubt, and where the charge concerns property which he had previously transferred, he is entitled to the presumption of law that he acted legally and in good faith in conveying it.[69] Yet if the evidence traces valuable property into the recent possession of the bankrupt, and then shows that he has failed to surrender it or account for it, it is incumbent on him to give a reasonable and credible account of its disappearance or disposition, and the jury will not be bound to accept his bare denial under oath.[70] In regard to the nature of the evidence admissible, it may be remarked that concealment of assets, like other offenses denounced by the bankruptcy law, may be proved by circumstantial evidence. "The evidence in such cases must accommodate itself to the issue to be tried, and be such as, in the practical affairs of life, tends to produce belief and conviction in the minds of those to whom such evidence is addressed. In other words, the evidence must in general be largely, if not wholly, circumstantial, and be in large measure governed by what the trial court in its judicial discretion shall consider its

[67] Kovoloff v. United States (C. C. A.) 202 Fed. 475, 28 Am. Bankr. Rep. 767.

[68] United States v. Waldman, 188 Fed. 524, 26 Am. Bankr. Rep. 677.

[69] Chodkowski v. United States, 194 Fed. 858, 114 C. C. A. 624, 28 Am. Bankr. Rep. 62. In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting it in the concealment of assets from its trustee, the fact that there was no evidence that the defendant was holding the money for the bankrupt did not impair the government's case. Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

[70] In re Lasky, 163 Fed. 99, 20 Am. Bankr. Rep. 729; United States v. Stern, 186 Fed. 854, 26 Am. Bankr. Rep. 110; Stern v. United States, 193 Fed. 888, 114 C. C. A. 102, 28 Am. Bankr. Rep. 101; Glass v. United States, 231 Fed. 65, 145 C. C. A. 253, 36 Am. Bankr. Rep. 550; Terry v. United States, 235 Fed. 701, 149 C. C. A. 121, 37 Am. Bankr. Rep. 666; Wolf v. United States, 238 Fed. 902, 152 C. C. A. 36, 39 Am. Bankr. Rep. 107.

appropriateness to the issue presented in a particular case."[71] But of course the court must also apply the ordinary rules for excluding evidence which is immaterial or too remote for consideration.[72] In a case of this kind, it is not improper to admit evidence of the amount and value of the defendant's stock in trade a few days prior to the filing of the petition in bankruptcy and also a short time afterwards,[73] and the trustee may testify that he was never informed by the bankrupt that property belonging to him was stored in a particular place, the property described in the indictment having been found by the trustee in that place.[74] To prove a continuous concealment of property, it is not necessary to take up each moment of the bankrupt's life while the proceedings lasted, and prove what he did as a means of proving what he failed to do,[75] nor is it necessary to prove the concealment of each and every article or sum of money set forth in the indictment, but proof of the concealment of any part of the property or money described is sufficient to sustain a conviction.[76] And it is not necessary to prove that a demand for the surrender of the property was made by the trustee.[77] But it is absolutely essential to show a valid adjudication in bankruptcy. Without this a conviction cannot stand. Concealment of assets from a de facto trustee is not within the statute.[78]

It has been held that, on a prosecution of a bankrupt for concealing property, the schedules filed by him in the bankruptcy proceeding are not admissible in evidence against him.[79] These decisions were rested upon an act of Congress which provides that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence or in any manner used against him in any criminal proceeding in any court of the United States.[80] But this statute has been repealed since the decision

[71] Stern v. United States, 193 Fed. 888, 114 C. C. A. 102, 28 Am. Bankr. Rep. 101. Where it appeared that the bankrupt, shortly before his adjudication, converted into money merchandise which he had bought on credit, evidence of conversations by the bankrupt at the time of disposing of the merchandise was admissible. Green v. United States, 240 Fed. 949, 153 C. C. A. 635, 39 Am. Bankr. Rep. 637.

[72] Bean v. United States, 192 Fed. 859, 113 C. C. A. 183, 27 Am. Bankr. Rep. 759; McNiel v. United States (C. C. A.) 150 Fed. 82, 18 Am. Bankr. Rep. 18. And see Meyer v. United States, 220 Fed. 822, 136 C. C. A. 432, 33 Am. Bankr. Rep. 877.

[73] Jacobs v. United States (C. C. A.) 161 Fed. 694, 20 Am. Bankr. Rep. 550.

[74] Johnson v. United States, 170 Fed. 581, 95 C. C. A. 661, 22 Am. Bankr. Rep. 359.

[75] Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724.

[76] United States v. Stern, 186 Fed. 854, 26 Am. Bankr. Rep. 110.

[77] United States v. Smith, 13 N. B. R. 61, Fed. Cas. No. 16,339.

[78] Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. Bankr. Rep. 32.

[79] Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724; Cohen v. United States, 170 Fed. 715, 96 C. C. A. 35, 22 Am. Bankr. Rep. 533.

[80] Rev. Stat. U. S. § 860, U. S. Comp. St. 1901, p. 661.

of the cases above cited.[81] It is true the bankruptcy law also contains a provision for the protection of the bankrupt. In providing for his examination in bankruptcy concerning his property, business, and affairs, it directs that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."[82] But the Supreme Court of the United States holds that the protection afforded by this provision extends only to the testimony given by the bankrupt on his examination under that section of the bankruptcy law, and does not render inadmissible, on a criminal prosecution, the schedules filed by him in the bankruptcy proceeding.[83] But it may be open to serious question whether the broad provision of the fifth amendment to the federal Constitution would not protect the bankrupt against the admission of his schedules in evidence against him in a criminal case in a federal court. This question is not precluded by the decision of the Supreme Court above mentioned, because the prosecution there considered, and in which the schedules were held admissible, was not in a federal court, but in a state court (where the fifth amendment does not apply), and was not for an offense under the bankruptcy law, but for a violation of a state statute forbidding bankers to receive deposits when insolvent.

Returning to the privilege of immunity granted by the seventh section of the bankruptcy act, it is held that this does not protect the bankrupt from prosecution for perjury committed in the course of the examination therein referred to,[84] nor from a prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed in opposition to his application for discharge.[85]

The crime of false swearing in bankruptcy proceedings is an entirely different offense from perjury at common law or under the federal criminal code, and it was not regarded by Congress as of equal enormity or of an equally aggravated character as perjury strictly so called. Hence it is not within the ancient rule of the common law that, to sustain a conviction of perjury, it must be proved by two witnesses, or by one witness with corroborating circumstances; and evidence which not only contradicts the defendant's testimony, but so far preponderates as to justify the jury in finding that the testimony in question was not only false, but was made or given by the defendant knowingly and fraudu-

[81] Act Cong. May 7, 1910, 36 Stat. 352, U. S. Comp. Stat. Supp. 1911, p. 272.

[82] Bankruptcy Act 1898, § 7, cl. 9.

[83] Ensign v. Pennsylvania, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658, 30 Am. Bankr. Rep. 408; United States v. Green (D. C.) 220 Fed. 973, 34 Am. Bankr. Rep. 405.

[84] Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

[85] Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649.

lently, is enough to sustain a conviction.[86] In a prosecution for making false oaths in a proceeding in bankruptcy, the judgment roll in a previous action, to which defendant was a party, is admissible as bearing on his motive and the reason for his testimony in the bankruptcy proceeding.[87] So, the books of a bankrupt corporation, with explanatory testimony of accountants, and statements of the corporation made to credit companies, of which defendant had knowledge, are admissible in a prosecution for falsely claiming that payments made by defendant to the bankrupt were loans and not for the purchase of stock.[88] And in a prosecution for perjury committed by defendant in his examination concerning the estate of a bankrupt, evidence of defendant's confidential relations with the bankrupt are admissible to show motive.[89]

[86] Kahn v. United States, 214 Fed. 54, 130 C. C. A. 494, 32 Am. Bankr. Rep. 109.

[87] Hopkins v. United States, 234 Fed. 867, 148 C. C. A. 465, 37 Am. Bankr. Rep. 767.

[88] Levinson v. United States (C. C. A.) 203 Fed. 257, 45 Am. Bankr. Rep. 305.

[89] Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127, 34 Am. Bankr. Rep. 143.

APPENDIX

UNITED STATES BANKRUPTCY LAW

OF

JULY 1, 1898

AND

AMENDMENTS THERETO TO JANUARY 28, 1915[1]

CHAPTER I.

DEFINITIONS.

Section 1. MEANING OF WORDS AND PHRASES.—a The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United

—"A person against whom a petition has been filed."

—"adjudication."

—"appellate courts."

—"bankrupt."

—"clerk."

—"corporations."

—"court."

—"courts of bankruptcy."

[1] The text of the Bankruptcy Act of 1898 is here reprinted in full, together with all amendments. The original text of the statute is printed in Roman characters. Sections and parts of sections amended are enclosed in brackets. The amendatory matter, or substituted new section or part of a section, follows immediately after the part amended, and is printed in Italic characters. The successive amendments to the act were approved February 5, 1903 (32 Stat. 797), June 6, 1906 (34 Stat. 267), June 25, 1910 (36 Stat. 838), and January 28, 1915 (38 Stat. 804).

—"creditor." States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

—"date of bankruptcy;" "bankruptcy," etc.

—"debt."

—"discharge."

—"document."

—"holiday."

—when deemed "insolvent."

—"judge."

—"oath."

—"officer."

—"persons."

—"petition."

—"referee."

—"conceal."

—"secured creditor."

—"States."

—"transfer."

—"trustee."

—"wage-earner."

Words in masculine gender.

—importing, plural.

—importing, singular.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Courts of bankruptcy.

SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; [(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;] *(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services* (amendment of 1903); ***authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this Act*** (amendment of 1910); (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully admin-

—U. S. District courts.

—supreme court, D. C.

—Territorial courts.

Jurisdiction.

—to adjudge bankrupt.

—allow and disallow claims, etc.

—appoint receivers, etc.

—try and punish bankrupts, etc.

—to permit temporary transaction of business.

—to substitute additional persons in proceedings, etc.

—to collect and distribute assets.

—to close estates.

—to confirm or reject compositions.
—to modify, etc., referees' findings.
—determine exemptions.
—discharge bankrupts, etc.
—enforce orders.
—extradite bankrupts.
—make orders.
—punish for contempt.
—appoint trustees.
—tax costs.
—transfer cases.

istered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) [transfer cases to other courts of bankruptcy.] *Transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.* (Amendment of 1903.)

Unspecified powers.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

Bankrupts.

BANKRUPTS.

Acts of bankruptcy.
—of what to consist.

SEC. 3. ACTS OF BANKRUPTCY.—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or [(4) made a general assignment for the benefit of his creditors;] *or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States* (amendment of 1903); or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Petition to be filed within 4 months.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until

four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment. —from when to date.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt. Defense of solvency. —burden of proof.

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. Person denying insolvency. —to testify. —burden of proof, etc.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. Petitioner give bond. —liability for costs, etc.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. —allowance of costs, etc. Counsel fees, etc., to be fixed by court.

Sec. 4. WHO MAY BECOME BANKRUPTS.—a [Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.] *Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.* (Amendment of 1910.) Who may become bankrupts. —voluntary.

[b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, —involuntary.

may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.] *b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.*

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. (Amendment of 1903.)

Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. (Amendment of 1910.)

Partnership.

Sec. 5. PARTNERS.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

—administration of estate.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

—jurisdiction over one partner sufficient.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

—trustee's duty.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners

—expenses.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

—payment of partnership debts.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

—payment of individual debts.

—surplus of partnership property.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. Claims of partnership against individual estates, etc.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. Administration of estate where all partners are not bankrupt.

Sec. 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. Exemption of bankrupts.

Sec. 7. DUTIES OF BANKRUPTS.—a The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding. Duties of bankrupts specified.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. Bankrupt, when not compelled to attend meeting.

—examine claims.

Expenses for attending meetings.

Death or insanity of bankrupts.

—not to abate proceedings.

—widow entitled to dower, etc.

Sec. 8. DEATH OR INSANITY OF BANKRUPTS.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Protection and detention of bankrupts.

Exemption from arrest.

Sec. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Detention for purposes of examination.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

May be kept in custody ten days, etc.

Extradition of bankrupts.

Sec. 10. EXTRADITION OF BANKRUPTS.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Suits by and against bankrupts.

Sec. 11. SUITS BY AND AGAINST BANKRUPTS.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

—stay until adjudication.

—further stay.

—appearance of trustee.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

—commenced prior to adjudication.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. Time for bringing suits against trustees.

Sec. 12. COMPOSITIONS, WHEN CONFIRMED.—a [A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.] *A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.* (Amendment of 1910.) Compositions. —when may be offered.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. —application for confirming.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. —date, etc., for hearing.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. —conditions of confirmance.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. —distribution of consideration.

Sec. 13. COMPOSITIONS, WHEN SET ASIDE.—a The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition. —may be set aside. —upon practice of fraud.

Sec. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing Discharges. —application for.

it within such time, it may be filed within but not after the expiration of the next six months.

—hearing of application.

[b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.]

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. (Amendment of 1903.) *The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.* (Amendment of 1910.)

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. Confirmation discharges from debts.

Sec. 15. DISCHARGES, WHEN REVOKED.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge. Discharges, when revoked.

Sec. 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. Co-debtors' liability not affected by bankrupt's discharge, etc.

[**Sec. 17.** DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.] Debts not affected by a discharge. —U. S. and State taxes. —judgments in fraud actions, etc. —claims not scheduled, etc. —created by fraud, etc.

Sec. 17. Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property or another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. (Amendment of 1903.)

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Courts and procedure.

Sec. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—[a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in Service of petition, involuntary bankruptcy. —returnable in 15 days. —by publication.

suits in equity in courts of the United States.] *a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.* (Amendment of 1903.)

Pleading within 10 days.

[b The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.] *b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.* (Amendment of 1903.)

—verification.

c All pleadings setting up matters of fact shall be verified under oath.

Court to determine issues when facts controverted.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

Decision where pleadings not filed.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

If judge absent, case to be referred to referee.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Hearing on filing voluntary petition.

—absence of judge.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Jury trials.

—person against whom involuntary petition filed, entitled.

Sec. 19. JURY TRIALS.—a A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

—right waived.

Attendance of jury, etc.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed. or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be

certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Laws as to jury trials applicable.

c The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Oaths, by whom administered.

Sec. 20. OATHS, AFFIRMATIONS.—a Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Affirmations.

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Evidence. Compulsory attendance of witnesses.

Sec. 21. EVIDENCE.—[a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.]

a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt. (Amendment of 1903.)

Depositions, laws governing.

b The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

—notice of taking.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Certified copies of proceedings evidence.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

—of order approving trustees' bond.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

—of order confirming composition, etc.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

—evidence of reinvesting title in bankrupt.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Reference of cases after adjudication.

Sec. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

Transfer of case to different referee.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Jurisdiction of United States and State courts. —circuit courts.

Sec. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by trustees, where brought.

[b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.]

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e. (Amendment of 1903.)

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e. (Amendment of 1910.)

Concurrent jurisdiction in circuit courts and courts of bankruptcy.

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.[1]

Appellate courts, jurisdiction of.

Sec. 24. JURISDICTION OF APPELLATE COURTS.—a The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now

[1] But see Federal Judicial Code 1911, § 289, abolishing the circuit courts of the United States.

or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

—appeals from courts not in organized circuits and in District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Jurisdiction of circuit court of appeals.

(NOTE. The appellate jurisdiction of the Supreme Court of the United States, as defined in the foregoing section was greatly restricted by the provisions of the Act of Congress of January 28, 1915 (38 Stat. 804) § 4, as follows: "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree.")

Sec. 25. APPEALS AND WRITS OF ERROR.—a That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Appeals

—when taken.

—to be within 10 days.

—hearing.

b From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

Appeal to U. S. Supreme Court.

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

—where amount exceeds $2,000, etc.

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

—where question certified by Supreme Court Justice.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

—trustees not to give bond.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

—certification to Supreme Court by courts.

(NOTE. The foregoing section was amended, and the appellate jurisdiction of the Supreme Court of the United States restricted, by the following provision of Section 4 of the Act of Congress of January 28, 1915 (38

Stat 804): "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree.")

Arbitration of controversies. —trustees may submit to.

Sec. 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

Selection of arbitrators.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

Findings of arbitrators.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Compromise by trustee.

Sec. 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Designation of newspapers to publish notices.

Sec. 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Penalty. —for misappropriating property.

Sec. 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

—concealing property. —false oath or account, etc. —presenting false claim. —receiving property from bankrupt. —extorting money for forbearing to act, etc.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having know-

ingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

—acting as referee when interested.
—purchasing property, etc.
—refused to permit inspection of accounts.

d A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Prosecutions to be in one year.

Sec. 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

United States Supreme Court to make rules, etc.

Sec. 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Computation of time

Sec. 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

Transfer of cases commenced in different courts.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Officers.

Sec. 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

Offices of referee and trustee created.

Sec. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.—a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Referees, appointment, etc.
—designation of districts.

Sec. 35. QUALIFICATIONS OF REFEREES.—a Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

—qualifications.

—to take oath.

Sec. 36. OATHS OF OFFICE OF REFEREES.—a Referees shall take the same oath of office as that prescribed for judges of United States courts.

—number of.

Sec. 37. NUMBER OF REFEREES.—a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Jurisdiction of referees.

—to consider petitions.

—administer oaths, examine witnesses, etc.

—take possession and release property, etc.

—perform certain duties of bankruptcy courts

—authorize employment of stenographers.

Sec. 38. JURISDICTION OF REFEREES.—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Referees' duties.

—declare dividends.

—examine schedules, etc.

—furnish information, etc.

—give notices.

—prepare records, etc.

—prepare schedules, etc.

—preserve records, etc.

—transmit papers to clerks, etc.

—preserve evidence, etc.

—obtain papers, etc.

Sec. 39. DUTIES OF REFEREES.—a Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy

convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy. —not to act if interested.

Sec. 40. COMPENSATION OF REFEREES.—[a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.] *a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.* (Amendment of 1903.) Compensation of referees.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees. —on transfer from one to another.

c In the event of the reference of a case being revoked before it is concluded, and when the case is especially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee. —where reference revoked.

Sec. 41. CONTEMPTS BEFORE REFEREES.—a A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. Contempt before referees. When witness not required to attend.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court. Contempt proceedings. —penalty.

Sec. 42. RECORDS OF REFEREES.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States. Records of referees. —manner of keeping.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Referees' absence or disability.

—filling vacancy.

Sec. 43. REFEREE'S ABSENCE OR DISABILITY.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Trustees.

—appointment.

Sec. 44. APPOINTMENT OF TRUSTEES.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

—qualifications.

Sec. 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

—death or removal.

—suits not to abate, etc.

Sec. 46. DEATH OR REMOVAL OF TRUSTEES.—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

—duties specified.

Sec. 47. DUTIES OF TRUSTEES.—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) [collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;] *collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied,* (Amendment of 1910); (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts ex-

pended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

—concurrence of two out of three necessary.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the costs and disbursements of the proceedings. (Amendment of 1903.)

Trustees' compensation.

Sec. 48. COMPENSATION OF TRUSTEES.—[a Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.] *a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.* (Amendment of 1903.)

—fee.

—commissions.

—apportionment where more than one.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

—withholding of. c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

(NOTE.—The Act of Congress of June 25, 1910, 36 Stat. 838, amended the foregoing forty-eighth section by striking out the whole of it, and substituting the section which immediately follows, bearing the same number.)

SEC. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS:

"(a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

"(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

"(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

"(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

"(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act."

Trustees' accounts and papers.

Sec. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Bonds of referees.

Sec. 50. BONDS OF REFEREES AND TRUSTEES.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

—of trustees.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

—of new trustee, etc.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

—amount may be increased.

Surety's property, value.

d The court shall require evidence as to the actual value of the property of sureties.

—two necessary.

e There shall be at least two sureties upon each bond.

—excess of property.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

—corporations may be.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Filing of bonds.

h Bonds of referees, trustees, and designated depositors shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Bond, trustee's liability.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

—joint.

j Joint trustees may give joint or several bonds.

—failure to give creates vacancy.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

—suits upon referees'.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

—suits upon trustees'.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Clerks' duties.

Sec. 51. DUTIES OF CLERKS.—a Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

—to account.

—collect fees, etc.

—deliver papers to referee, etc.

—pay referee.

Compensation of clerks.

Sec. 52. COMPENSATION OF CLERKS AND MARSHALS.—a Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

—of marshals.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Attorney-General to report annually.

Sec. 53. DUTIES OF ATTORNEY-GENERAL.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

—statistical information for.

Sec. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records

and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Creditors.

Sec. 55. MEETINGS OF CREDITORS.—a The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. —place and time of meeting.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. —presiding officer, duties.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act. Creditors' duty.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. —subsequent meetings of.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request. —call of meeting by court.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered. —final meeting.

Sec. 56. VOTES AT MEETINGS OF CREDITORS.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. Voting at creditors' meetings.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess. —holders of secured claims, not entitled, etc.

Sec. 57. PROOF AND ALLOWANCE OF CLAIMS.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, Proof of claims. —of what to consist.

and that the sum claimed is justly owing from the bankrupt to the creditor.

—when founded upon a writing.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

—after proved, may be filed.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

—allowance of claims, etc.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Claims of secured creditors, etc.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

Claims, hearing objections.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

Preferred claims.

[g The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.]

g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. (Amendment of 1903.)

Value of securities held by secured creditors, etc.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Claims secured by individual undertaking.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

Debts due the United States, allowance of.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. Reconsideration of claims.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. —recovery of dividend.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. Claims of one bankrupt against another.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer. Time for proving claims. —of infants, etc.

Sec. 58. NOTICES TO CREDITORS.—a [Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.] Notice to creditors. —unless waived, etc.

Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts. (Amendment of 1910.)

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct: the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. —of first meeting. —other notices.

c All notices shall be given by the referee, unless otherwise ordered by the judge. —to referee.

Sec. 59. WHO MAY FILE AND DISMISS PETITIONS.—a Any qualified person may file a petition to be adjudged a voluntary bankrupt. Petition, who may file. —as voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value

—involuntary.

of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

—to be in duplicate.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

Notice to creditors not joined in petition.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a large number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

—hearing of case, etc.

—when dismissed.

Creditors, computing number of.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

—appearance of.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Notice of dismissal.

g [A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.]

A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. (Amendment of 1910.)

Preferred creditors.

Sec. 60. PREFERRED CREDITORS.—[a A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.]

a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months

after the date of the recording or registering of the transfer, if by law such recording or registering is required. (Amendment of 1903.)

Preference, when given.

[b If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.]

—voidable.

b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. (Amendment of 1903.)

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. (Amendment of 1910.)

Preferred creditor giving further credit, etc.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

—set off of new credit.

Payments to attorneys, etc.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

—reexamination of.

CHAPTER VII.

ESTATES.

Estates.

Sec. 61. DEPOSITORIES FOR MONEY.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for

Depositories for money.

the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

—bond.

Expenses of administering estates.

Sec. 62. EXPENSES OF ADMINISTERING ESTATES.—a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

—report and approval.

Debts proved.

Sec. 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

—fixed liability.

—costs of suit due, etc.

—costs incurred before filing petition.

—on open account.

—judgments, etc.

Allowance of unliquidated claims.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Debts having priority. —taxes.

Sec. 64. DEBTS WHICH HAVE PRIORITY.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; [(2) the filing fees paid by creditors in involuntary cases;] *(2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery* (Amendment of 1903); (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter

—order of payment.

—cost of preserving estate.

—filing fees.

—cost of administration, etc.

provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) [wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant;] *wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant* (Amendment of June 15, 1906); and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

—wages of workmen, etc.

—owing to person entitled to priority, etc.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Payment of claims accruing after composition, when discharge revoked, etc.

Sec. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

Dividends. —on allowed claims.

[b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.]

—declaration of first.

—subsequent.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared. (Amendment of 1903.)

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

—creditors receiving, not affected by proof of subsequent claims, etc.

—preference of certain creditors.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

Limit to claimant's right to collect.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Unclaimed dividends.

—after 6 months paid into court.

—after 1 year, distributed.

—of minors.

Sec. 66. UNCLAIMED DIVIDENDS.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Liens.

—unrecorded claims not.

Sec. 67. LIENS.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

—trustee subrogated to rights of creditor.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Lien, judgment, etc., created within 4 months, to be dissolved.

—if defendant were insolvent.

—knowledge of.

—through fraud.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

—trustee subrogated, etc.

Liens given in good faith, etc.

d [Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.]

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act. (Amendment of 1910.)

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.* (Amendment of 1903.)

Conveyances, etc., subsequent to act and within four months of petition.

—to defraud, etc., void.

—property remains part of assets.

Conveyances, etc., within four months of petition.

—void under State laws.

—void under this act.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Liens, etc., created through legal proceedings.

—void, etc.

—property passes to trustee.

Court may order conveyances.

Purchaser for value.

Sec. 68. SET-OFFS AND COUNTERCLAIMS.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

Set-offs and counterclaims.

—allowed.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing,

—not allowed.

with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Possession of property.

Sec. 69. POSSESSION OF PROPERTY.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

—when bankrupts' may be seized.

—bond to indemnify.

—released on giving bond.

Title to property.

Sec. 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

—vested in trustee.

—documents.

—patents, etc.

—certain powers.

—transferred in fraud.

—which might have been transferred, etc.

—policy of insurance.

—rights of action upon contracts.

Appraisal of property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

—sale.

Trustee to convey title.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

—vesting title on.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property

of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge. —setting composition aside.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.* (Amendment of 1903.) —may avoid certain transfers, etc. —recovery of property.

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him. Title revested on confirming composition.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

a This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. Force and effect. —petition for voluntary bankruptcy. —involuntary.

b Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it. Cases pending under State laws.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor. Indexes to be kept. Certificates of search to be issued.

Sec. 72. That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act. Referee and trustee not to be allowed further compensation.

That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight. (New sections added by act of 1903.)

Sec. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.

That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six. (Amendment of 1910.)

GENERAL ORDERS AND FORMS IN BANKRUPTCY

ADOPTED AND ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES NOVEMBER 28, 1898

TABLE OF THE GENERAL ORDERS

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these

general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petititioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the

debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not e removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. *If the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending the deposition may be made by some officer or agent of the corporation having knowledge of the facts.* (Words in italics were added by amendment promulgated November 1, 1915.) Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint; and thereafter,

and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order

was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee desig-

nated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper

and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.[1]

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or de-

[1] The Supreme Court, on December 11, 1905, ordered that General Order No. 35, should be amended by adding the following sentence to the fourth subdivision thereof:
"He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned."

cree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

TABLE OF FORMS.

[FORM No. 1.]

DEBTOR'S PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States for the ———
District of ———:

The petition of ——— ———, of ———, in the county of ———, and district and State of ———, ——— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicil] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———.

——— ———, *Attorney.*

United States of America, District of ———, ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———, *Petitioner.*

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

———,

———.

(*Official character.*)

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						$	c.
(1.) Taxes and debts due and owing to the United States.							
(2.) Taxes due and owing to the State of ——, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
					Total.....		

—— ——, *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	c.
				Total.....				

—— ——, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
					$	
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (5)

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	c.
					Total		

——— ———, *Petitioner.*

OATH TO SCHEDULE A.

United States of America, District of ——— ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———— ————,
[*Official character.*]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c.
		Total.....		

——— ———, *Petitioner.*

SCHEDULE B. (2)

Personal property.

		$	
a.—Cash on hand			
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately)			
c.—Stock in trade, in — business of —— ——, at ——, of the value of ——			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.			
e.—Books, prints, and pictures, viz.....			
f.—Horses, cows, sheep, and other animals (with number of each), viz.			
g.—Carriages and other vehicles, viz.			
h.—Farming stock and implements of husbandry, viz.			
i.—Shipping, and shares in vessels, viz.....			
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....			
l.—Patents, copyrights, and trade-marks, viz.....			
m.—Goods or personal property of any other description, with the place where each is situated, viz.....			
	Total		

—— ——, *Petitioner.*

SCHEDULE B. (3)

Choses in action.

		Dolls.	Cts.
a.—Debts due petitioner on open account.....			
b.—Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds			
c.—Policies of insurance			
d.—Unliquidated claims of every nature, with their estimated value			
e.—Deposits of money in banking institutions and elsewhere....			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
		$	c.
Interest in land			
Personal property			
Property in money, stock, shares, bonds, annuities, etc.			
Rights and powers, legacies and bequests	Total		

Property heretofore conveyed for benefit of creditors.	Amount realized from proceeds of property conveyed.	
	$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor		
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy		
Total		

——— ———, *Petitioner.*

SCHEDULE B. (6)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

		Valuation.	
		$	c.
Military uniform, arms, and equipments			
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Deeds.

Papers.

——— ———, *Petitioner.*

OATH TO SCHEDULE B.

United States of America, District of ———, ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

——— ———,

———,

[*Official character.*]

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A	1 (1)	Taxes and debts due United States			
" "	1 (2)	Taxes due States, counties, districts, and municipalities.			
" "	1 (3)	Wages			
" "	1 (4)	Other debts preferred by law			
Schedule A	2	Secured claims			
Schedule A	3	Unsecured claims			
Schedule A	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A	5	Accommodation paper			
		Schedule A, total			
Schedule B	1	Real estate			
Schedule B	2-a	Cash on hand			
" "	2-b	Bills, promissory notes, and securities			
" "	2-c	Stock in trade			
" "	2-d	Household goods, &c			
" "	2-e	Books, prints, and pictures			
" "	2-f	Horses, cows, and other animals			
" "	2-g	Carriages and other vehicles			
" "	2-h	Farming stock and implements			
" "	2-i	Shipping and shares in vessels			
" "	2-k	Machinery, tools, &c			
" "	2-l	Patents, copyrights, and trade-marks			
" "	2-m	Other personal property			
Schedule B	3-a	Debts due on open accounts			
" "	3-b	Stocks, negotiable bonds, &c			
" "	3-c	Policies of insurance			
" "	3-d	Unliquidated claims			
" "	3-e	Deposits of money in banks and elsewhere			
Schedule B	4	Property in reversion, remainder, trust, &c.			
Schedule B	5	Property claimed to be excepted			
Schedule B	6	Books, deeds, and papers			
		Schedule B, total			

[FORM No. 2.]

PARTNERSHIP PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the —— District of ———:

The petition of ——— ——— respectfully represents:

That your petitioners and ——— ——— have been partners under the firm name of ——— ———, having their principal place of business at ———, in the county of ———, and district and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath , contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath , contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

——— ———, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

——— ———,
——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 3.]

CREDITORS' PETITION.

To the Honorable ——— ———, judge of the District Court of the United States for the —— district of ———:

The petition of ——— ———, of ——— and ——— ———, of ———, and ——— ———, of ———, respectfully shows:

That ——— ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or* resided, *or* had his domicil] at ———, in the county of ——— and State and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——— ———, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows: _____

_____

And your petitioners further represent that said ——— ——— is insolvent, and that within four months next preceding the date of this petition the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of _____

_____

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——— ———, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

United States of America, District of ———, ss.:

——— ———, ——— ———, ——— ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ——— ———, this —— day of ———, 189—.

——— ———,
——— ———.
(Official character.)

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 4.]

ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

In the District Court of the United States for the —— District of ———.

In the matter of _____	In Bankruptcy.

Upon consideration of the petition of ——— ——— that ——— ——— be declared a bankrupt, it is ordered that the said ——— ——— do appear at this court, as a court of bankruptcy, to be holden at ———, in the district

aforesaid, on the —— day of ———, at — o'clock in the ——— noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——— ———, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 5.]

Subpœna to Alleged Bankrupt.

United States of America, ——— District of ———.

To ——— ———, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the ——— district of ———, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ———, in said district, on the ——— day of ———, A. D. 189—, ——— ——— to answer to a petition filed by ——— ——— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this ——— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 6.]

Denial of Bankruptcy.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— } In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—.

And now the said ——— ——— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 7.]

ORDER FOR JURY TRIAL.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

At ———, in said district, on the ——— day of ———, 18—.

Upon the demand in writing filed by ——— ———, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

{ Seal of the court. }

——— ———,
Clerk.

[FORM No. 8.]

SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the ——— day of ———, A. D. 18—, filed against ——— ———, of the county of ——— and State of ———, in said district, and said petition is still pending; and whereas it satisfactorily appears that said ——— has committed an act of bankruptcy [*or* has neglected *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——— ———, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of of the within-named ——— ———, and of all his deeds, books of account, and papers which have come to my knowledge.

——— ———,
Marshal [or *Deputy Marshal*].

Fees and expenses.

1. Service of warrant		
2. Necessary travel, at the rate of six cents a mile each way.....		
3. Actual expenses in custody of property and other services as follows		
[Here state the particulars.]		

——— ———,
Marshal [or *Deputy Marshal*].

District of ———, A. D. 18—.

Personally appeared before me the said ——— ———, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

——— ———,
Referee in Bankruptcy.

[FORM No. 9.]

BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ——— A. D., 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ——— against the said ———, and the said ——— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ——— ———, subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ——— ——— shall indemnify the said ——— ——— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
presence of —

——— [SEAL.]
——— ——— [SEAL.]
——— ——— [SEAL.]
——— ——— [SEAL.]

Approved this —— day of ———, A. D., 189—.

——— ———.
District Judge.

[FORM No. 10.]

BOND TO MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ——— A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ——— ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——— ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ——— ———, and the said ——— ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of —

——— ——— ——— ——— [SEAL.]

——— ——— ——— ——— [SEAL.]

——— ——— ——— ——— [SEAL.]

Approved this ——— day of ———, A. D. 189—.

———,

District Judge.

[FORM No. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

At ———, in said district, on ——— day of ———, A. D. 18—, before the Honorable ——— ———, judge of the ——— district of ———.

This cause came on to be heard at ———, in said court, upon the petition of ——— that ——— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said ——— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{ Seal of the court. }

———— ————,
Clerk.

[Form No. 12.]

ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before the Honorable ——— ———, judge of said court in bankruptcy, the petition of ——— ——— that ——— ——— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ——— ——— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{ Seal of the court. }

———— ————,
Clerk.

[Form No. 13.]

APPOINTMENT, OATH, AND REPORT OF APPRAISERS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————— *Bankrupt.*	In Bankruptcy.

It is ordered that ——— ———, of ———, ——— ——— of ———, and ——— ———, of ———, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ———, A. D. 18—.

———— ————,
Referee in Bankruptcy.

—— District of ———, ss.:

Personally appeared the within named ——— ——— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

———— ————.
———— ————.
———— ————.

Subscribed and sworn to before me this —— day of ———, A. D. 189—.

———— ————,
[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ———, this —— day of ———, A. D. 18—.

———— ————.
———— ————.
———— ————.

[FORM No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ———— *Bankrupt*.	In Bankruptcy.

Whereas ———.———, of ———, in the county of ——— and district aforesaid, on the —— day of ———, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or*, against] him on the —— day of ———, A. D. 189—, according to the provisions of the acts of Congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ——— at ———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{Seal of the court.}

———— ————,
Clerk.

[FORM No. 15.]

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——————————— 	In Bankruptcy.

Whereas on the —— day of ———, A. D. 18—, a petition was filed to have ——— ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ———, A. D. 189—, at ———.

Witness my hand and the seal of the said court, at ———, in said district, on the —— day of ———, A. D. 189—.

{Seal of the court.}

——— ———,
Clerk.

[FORM No. 16.]

REFEREE'S OATH OF OFFICE.

I, ——— ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
District Judge.

[FORM No. 17.]

BOND OF REFEREE.

Know all men by these presents: That we ——— ——— of ——— ——— as principal, and ——— ——— of ——— ——— and ——— ——— of ——— ———, as sureties are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 189—.

The condition of this obligation is such that whereas the said ——— ———, has been on the —— day of ———, A. D. 18—, appointed by the Honorable ——— ———, judge of the district court of the United States for the ——— district of ———, a referee in bankruptcy, in and for the county of ———, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

——— ———, [L. S.]
——— ———, [L. S.]
——— ———, [L. S.]

Approved this —— day of ——— A. D. 189—.

——— ———,
District Judge.

[FORM No. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the —— District of ———. In Bankruptcy.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

To the creditors of ——— ———, of ———, in the county of ———, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of ——— A. D. 18—, the said ——— ——— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——— in ———, on the —— day of ———, A. D. 18—, at —— o'clock in the ——— noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

——— ———,
Referee in Bankruptcy.

——— ——, 18—.

[FORM No. 19.]

LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

——— ———,
Referee in Bankruptcy.

[FORM No. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy

To ——— ———:

——— ———.

I, ——— ———, of ———, in the county of ——— and State of ———, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the pur-

poses aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

——— ———. [L. s.]

Signed, sealed, and delivered in presence of—

——— ———.

Acknowledged before me this —— day of ———, A. D. 189—.

——— ———,

[Official character.]

[FORM No. 21.]

SPECIAL LETTER OF ATTORNEY IN FACT.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To ——— ———,

——— ———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the —— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

——— ———. [L. s.]

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

Signed, sealed, and delivered in presence of—

——— ———.

Acknowledged before me this —— day of ———, A. D. 18—.

——— ———,

(Official character.)

[FORM No. 22.]

APPOINTMENT OF TRUSTEE BY CREDITORS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here*

insert the names of the newspapers in which notice was published], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, to be the trustee— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby approved.

———— ————,
Referee in Bankruptcy.

[Form No. 23.]

Appointment of Trustee by Referee.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt. } In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, as trustee of the same.

———— ————,
Referee in Bankruptcy.

[Form No. 24.]

Notice to Trustee of his Appointment.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt. } In Bankruptcy.

To ——— ———, of ———, in the county of ———, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the

creditors, on the —— day of ———, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at ——— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——— the —— day of ———, A. D. 18—.

———— ————,
Referee in Bankruptcy.

[FORM No. 25.]

BOND OF TRUSTEE.

Know all men by these presents: That we, ———— ————, of ———, as principal, and ———— ————, of ———, and ———— ————, of ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such, that whereas the above-named ———— ———— was, on the —— day of ———, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein ———— ———— is the bankrupt, and he, the said ———— ————, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ———— ————, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of—

———— ———— ———— ————, [SEAL.]
———— ———— ———— ————, [SEAL.]
———— ————, [SEAL.]

[FORM No. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the —— District of ———, at ———, ———, this —— day of ———, 189—.

Before ———— ————, referee in bankruptcy, in the District Court of the United States for the ——— District of ———.

In the matter of ———————— *Bankrupt.*	In Bankruptcy.

It appearing to the Court ———— ————, of ———, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official du-

ties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of ——— dollars, it is ordered that the said bond be, and the same is hereby, approved.

———, *Referee in Bankruptcy.*

[FORM No. 27.]

ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the —— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

———, *Referee in Bankruptcy.*

[FORM No. 28.]

ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the —— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Upon the application of ——— ———, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before ——— ———, one of the referees in bankruptcy of this court, at ——— on the —— day of ———, at — o'clock in the —— noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——— ———, *Referee in Bankruptcy.*

[FORM No. 29.]

EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, one of the referees in bankruptcy of said court.

——— ———, of ———, in the county of ———, and State of ———, being duly sworn and examined at the time and place above mentioned, upon his oath says. [*Here insert substance of examination of party.*]

——— ———, *Referee in Bankruptcy.*

[FORM No. 30.]

SUMMONS TO WITNESS.

To ——— ———:

Whereas ——— ———, of ———, in the county of ———, and State of ———, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the ——— District of ———,

These are to require you, to whom this summons is directed, personally to be and appear before ——— ———, one of the referees in bankruptcy of the said court, at ———, on the —— day of ———, at — o'clock in the —— noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ——— Judge of said court, and the seal thereof at ———, this —— day of ———, A. D. 189—.

——— ———, *Clerk.*

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me came ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he did, on ———, the —— day of ———, A. D. 189—, personally serve ——— ———, of ———, in the county of ——— and State of ———, wit. a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———.

[FORM No. 31.]

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ——— dollars; that the consideration of said debt is as follows: ———

———

———

that no part of said debt has been paid [except ——— ———];

that there are no set-offs or counterclaims to the same [except ——— ———];

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

———,

Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,

[*Official character.*]

[FORM No. 32.]

PROOF OF SECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of ——— dollars; that the consideration of said debt is

as follows _____; that no part of said debt has been paid [except _____]; that there are no set-offs or counterclaims to the same [except _____]; and that the only securities held by this deponent for said debt are the following: _____

_____

_____

_____ _____,
Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. —.

_____ _____,
[Official character.]

[Form No. 33.]

Proof of Debt Due Corporation.

In the District Court of the United States for the ——— District of ——

In the matter of _____ *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ——— and State of ———, and made oath and says that he is ——— of the ———, a corporation incorporated by and under the laws of the State of ———, and carrying on business at ———, in the county of ——— and State of ———, and that he is duly authorized to make this proof, and says that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____;

that no part of said debt has been paid [except _____]; that there are no set-offs or counterclaims to the same [except _____]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

_____ _____,
——— *of said Corporation.*

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

_____ _____,
[Official character.]

[Form No. 34.]

Proof of Debt by Partnership.

In the District Court of the United States for the ——— District of ———.

In the matter of _____ *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of

———, and made oath and says that he is one of the firm of ——— ———, consisting of himself and ——— ———, of ———, in the county of ——— and State of ———; that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____;

that no part of said debt has been paid [except _____]; that there are no set-offs or counterclaims to the same [except _____]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

——— ———,
Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 35.]

PROOF OF DEBT BY AGENT OR ATTORNEY.

In the District Court of the United States for the ——— District of ———.

In the matter of _____ *Bankrupt.*	In Bankruptcy.

At ——— in said district of ——— on the —— day of ——— A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ———, in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____;

that no part of said debt has been paid [except _____

_____];

and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because _____

_____

and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 36.]

PROOF OF SECURED DEBT BY AGENT.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or*, authorized agent] of ———, in the county of ———, and State of ———, and made oath, and says that ——— ———, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ——— in the sum of ——— dollars; that the consideration of said debt is as follows: ———; that no part of said debt has been paid [except ———]; that there are no set-offs or counter claims to the same [except ———]; and that the only securities held by said ——— for said debt are the following ———; and this deponent further says that this deposition can not be made by the claimant in person because ———, and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,
[*Official character.*]

[FORM No. 37.]

AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

On this —— day of ———, A. D. 18—, at ———, came ——— ———, of ———, in the county of ———, and State of ———, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ———

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ——— ———, or any person

or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,
(*Official character.*)

[Form No. 38.]

Order Reducing Claim.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

Upon the evidence submitted to this court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ———, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ———, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ———, A. D. 18—].

———,
Referee in Bankruptcy.

[Form No. 39.]

Order Expunging Claim.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

Upon the evidence submitted to the court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

———,
Referee in Bankruptcy.

[FORM No. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

A list of debts proved and claimed under the bankruptcy of —— ——, with —— dividend at the rate of —— per cent this day declared thereon by —— ——, a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dolls.	Cts.	Dolls.	Cts.

——— ———,
Referee in Bankruptcy.

[FORM No. 41.]

NOTICE OF DIVIDEND.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

To ——— ———,

Creditor of ——— ———, bankrupt:

I hereby inform you that you may, on application at my office, ———, on the ——— day of ———, or on any day thereafter, between the hours of ———, re-

ceive a warrant for the ——— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

——— ———, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To ——— ———,

Trustee in bankruptcy of the estate of ——— ———, bankrupt:

Please deliver to ——— ——— the warrant for dividend payable out of the said estate to me.

——— ———, *Creditor.*

[FORM No. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: ———

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ———, A. D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[FORM No. 43.]

PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property*, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ———, A. D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ———, A. D. 189—.

———,
Referee in Bankruptcy.

[FORM No. 44.]

PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien,

or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ———, A. D. 189—.

— —— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

——— ———,

Referee in Bankruptcy.

———.

[Form No. 45.]

Petition and Order for Private Sale.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ———

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit: ———

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ———, A. D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

——— ———,

Referee in Bankruptcy.

[FORM No. 46.]

PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

Respectfully represents ——— ——— the said bankrupt, [*or*, a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit, ———

———

———

now in ———, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ———, A. D. 189—.

——— ———.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

———

[FORM No. 47.]

TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, on the —— day of ———, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments.....			
Property exempted by State laws...			

———,

Trustee.

[FORM No. 48.]

TRUSTEE'S RETURN OF NO ASSETS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

On the day aforesaid, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ———, this —— day of ———, A. D. 18—.

———,

Referee in Bankruptcy.

[FORM No. 49.]

ACCOUNT OF TRUSTEE.

Dr. *The estate of* —— ——, *bankrupt, in account with* —— ——, *trustee.* Cr.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[Form No. 50.]

Oath to Final Account of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he was, on the —— day of ———, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing —— sheets of paper, the first sheet whereof is marked with the letter —— [*reference may here also be made to any prior account filed by said trustee*] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt , and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——— ———, *Trustee.*

Subscribed and sworn to before me at ———, in said —— district of ———, this —— day of ———, A. D. 18—.

———,
[*Official character.*]

———

[Form No. 51.]

Order Allowing Account and Discharging Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

———,
Referee in Bankruptcy.

[FORM No. 52.]

PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

To the Honorable ——— ———,

Judge of the District Court for the —— District of ———:

The petition of ——— ———, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ———, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore ——— ——— pray that notice may be served upon said ———, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

——— ———.

[FORM No. 53.]

NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt .*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18-

To ——— ———,

Trustee of the estate of ——— ———, bankrupt:

You are hereby notified to appear before this court, at ———, on the —— day of ———, A. D. 18—, at — o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——— ———, one of the creditors of said bankrupt, filed in this court on the —— day of ———, A. D. 18— in which it is alleged [*here insert the allegation of the petition*].

——— ———, *Clerk.*

[Form No. 54.]

Order for Removal of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

Whereas ——— ———, of ———, did, on the —— day of ———, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, ——— ———, the trustee of the estate of said ——— ———, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ——— ——— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said ——— ——— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ——— ———, trustee [*or*, out of the estate of the said ——— ———, subject to prior charges].

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

{Seal of the court.}

——— ———,
Clerk.

[Form No. 55.]

Order for Choice of New Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of ——— ———, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ———, in ———, in said district, on the —— day of ———, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

——— ———, *Referee in Bankruptcy.*

[FORM No. 56.]

CERTIFICATE BY REFEREE TO JUDGE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

I, ——— ———, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ———, the —— day of ———, A. D. 18—.

——— ———,
Referee in Bankruptcy.

[FORM No. 57.]

BANKRUPT'S PETITION FOR DISCHARGE.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———,
Judge of the District Court of the United States for the District of ———.

——— ———, of ———, in the county of ——— and State of ———, in said district, respectfully represents that on the —— day of ———, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ———, A. D. 189—.

——— ———, *Bankrupt.*

ORDER OF NOTICE THEREON.

District of ———, *ss:*

On this —— day of ———, A. D. 189—, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the —— day of ———, A. D. 189—, before said court, at ———, in said district, at —— o'clock in the —— noon; and that notice thereof be published in ——— ———, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

—— hereby depose, on oath, that the foregoing order was published in the ——— ——— on the following ——— days, viz:

On the —— day of ——— and on the —— day of ———, in the year 189—.

——— ———.

District of ———.

——— ———, 189—.

Personally appeared ——— ———, and made oath that the foregoing statement by him subscribed is true.

Before me,

——— ———.
[*Official character.*]

I hereby certify that I have on this —— day of ———, A. D. 189—, sent by mail copies of the above order, as therein directed.

——— ———,
Clerk.

[Form No. 58.]

Specification of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

——— ———, of ———, in the county of ——— and State of ———, a party interested in the estate of said ——— ———, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

——— ———, *Creditor.*

[Form No. 59.]

Discharge of Bankrupt.

District Court of the United States,

——— District of ———.

Whereas, ——— ——— of ——— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said ——— ——— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ———, A. D. 189—, on which day the petition for ad-

judication was filed ——— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——— ———, judge of said district court, and the seal thereof this —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

[FORM No. 60.]

PETITION FOR MEETING TO CONSIDER COMPOSITION.

District Court of the United States for the ——— District of ———.

——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the —— District of ———:

The above-named bankrupt respectfully represent that a composition of ——— per cent upon all unsecured debts, not entitled to a priority ——— ——— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of ——— creditors whose claims are allowed.

Wherefore, he pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

——— ———,
Bankrupt.

[FORM No. 61.]

APPLICATION FOR CONFIRMATION OF COMPOSITION.

In the District Court of the United States, for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———.

At ———, in said district, on the —— day of ———, A. D. 189—, now comes ——— ———, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ———

dollars, has been deposited, subject to the order of the judge, in the ——— National Bank, of ———, a designated depository of money in bankruptcy cases.

Wherefore the said ——— ——— respectfully asks that the said composition may be confirmed by the court.

——— ———, *Bankrupt.*

[Form No. 62.]

Order Confirming Composition.

In the District Court of the United States, for the ——— District of ———.

In the matter of ——— } In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

[Form No. 63.]

Order of Distribution on Composition.

United States of America:
In the District Court of the United States, for the ——— District of ———.

In the matter of ——— } In Bankruptcy.
Bankrupt.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

UNITED STATES BANKRUPTCY LAW

OF

MARCH 2, 1867

AS CONTAINED IN

REVISED STATUTES U. S., §§ 4972-5132

CHAPTER ONE.

COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION, AND POWERS.

SEC. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

SEC. 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

SEC. 4974. A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

(NOTE.—This section is a literal copy of the first section of the act of 2 March, 1867, c. 176, v. 14, p. 517; and the act of 22 June, 1874, c. 390, s. 2, v. 18, p. 178, amended the said first section by the addition of the following proviso: "*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount.")

SEC. 4975. The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

SEC. 4976. In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

SEC. 4977. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the Supreme Court of the District of Columbia, when the bankrupt resides in that District.

SEC. 4978. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the supreme courts of the several Territories when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

SEC. 4979. The several circuit courts shall have within each district concurrent jurisdiction with the district court, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee.

SEC. 4980. Appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law, arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

SEC. 4981. No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

SEC. 4982. Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

SEC. 4983. If the appellant, in writing, waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

SEC. 4984. A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor.

SEC. 4985. The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

SEC. 4986. The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

SEC. 4987. The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.

SEC. 4988. In districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

SEC. 4989. No appeal or writ of error shall be allowed in any case arising under this Title from the circuit courts to the Supreme Court, unless the matter in dispute in such case exceeds two thousand dollars.

SEC. 4990. The general orders in bankruptcy heretofore adopted by the justices of the Supreme Court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders, for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed, except such as are established by this Title or by law, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody, and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

SEC. 4991. The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

SEC. 4992. The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated.

SEC. 4993. Each district judge shall appoint, upon the nomination and recommendation of the Chief Justice of the Supreme Court, one or more registers in bankruptcy, when any vacancy occurs in such office, to assist him in the performance of his duties, under this Title, unless he shall deem the continuance of the particular office unnecessary.

SEC. 4994. No person shall be eligible for appointment as register in bankruptcy, unless he is a counselor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

SEC. 4995. Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title, "PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS," and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

SEC. 4996. No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of those courts as courts of bankruptcy, nor shall he be interested in the fees or emoluments arising from any such trusts.

SEC. 4997. Registers are subject to removal from office by the judge of the district court.

SEC. 4998. Every register in bankruptcy has power:

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender of any bankrupt.

Third. To administrator oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit and pass accounts of assignees.

Ninth. To grant protection.

Tenth. To pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

SEC. 4999. No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

SEC. 5000. Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in the proper minute-book to be kept in his office.

SEC. 5001. The judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proofs of debts, and, generally, for the prosecution of any proceedings under this Title.

SEC. 5002. Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

SEC. 5003. Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

SEC. 5004. All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

SEC. 5005. Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna.

SEC. 5006. Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the

register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be compellable by law to answer such question or to sign such examination.

SEC. 5007. Any register may act in the place of any other register appointed by and for the same district court.

SEC. 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

SEC. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

SEC. 5010. Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceedings; but every such certificate may be discharged or varied by the judge at chambers or in open court.

SEC. 5011. In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

SEC. 5012. If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, willfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

SEC. 5013. In this Title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

CHAPTER TWO.

VOLUNTARY BANKRUPTCY.

SEC. 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

SEC. 5015. The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

SEC. 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

SEC. 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

SEC. 5018. Every citizen of the United States petitioning to be declared bankrupt shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

SEC. 5019. Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies.

SEC. 5020. Every bankrupt shall be at liberty, from [time] to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

CHAPTER THREE.

INVOLUNTARY BANKRUPTCY.

SEC. 5021. Any person residing within the jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars:

First. Who departs from the State, district, or Territory of which he is an inhabitant with intent to defraud his creditors, or, being absent, remains absent with such intent; or,

Second. Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in bankruptcy; or,

Third. Who conceals or removes any of his property to avoid its being attached, taken, or sequestered on legal process; or,

Fourth. Who makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or,

Fifth. Who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment, or in some other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or,

Sixth. Who has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upward; or,

Seventh. Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or gives any warrant to confess judgment; or procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or,

Eighth. Who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulenly stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Title, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Title was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

SEC. 5022. Any act of bankruptcy committed since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

SEC. 5023. An adjudication of bankruptcy may be made on the petition of

one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

SEC. 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction, restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

SEC. 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor cannot be found, and his place of residence cannot be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

SEC. 5026. On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

SEC. 5027. If upon such hearing or trial the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

SEC. 5028. If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

SEC. 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same man-

ner and with similar proceedings to those [*hereinbefore*] [hereinafter] provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

SEC. 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor.

SEC. 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

CHAPTER FOUR.

PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

SEC. 5032. The notice to creditors under warrant shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

SEC. 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

SEC. 5034. The creditors shall, at the first meeting held after due notice from the messenger in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

SEC. 5035. No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

SEC. 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SEC. 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

SEC. 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

SEC. 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

SEC. 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

SEC. 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

SEC. 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

SEC. 5043. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

SEC. 5044. As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

SEC. 5045. There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

SEC. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any

cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

SEC. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

SEC. 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

SEC. 5049. A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

SEC. 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

SEC. 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

SEC. 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

SEC. 5053. No property held by the bankrupt in trust shall pass by the assignment.

SEC. 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded. [And the record of such assignment, or a duly-certified copy thereof, shall be evidence thereof in all courts.]

SEC. 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

SEC. 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause

thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

SEC. 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

SEC. 5058. The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SEC. 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

SEC. 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

SEC. 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and, under such direction, may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SEC. 5062. The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in his opinion, prove to the interest of the creditors.

SEC. 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

SEC. 5064. The assignee may sell and assign, under the direction of the court and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which cannot be collected and received by him without unreasonable or inconvenient delay or expense.

SEC. 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or as-

signee, as the case may be, who shall hold the funds received in place of the estate disposed of.

SEC. 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

SEC. 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

SEC. 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

SEC. 5069. When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

SEC. 5070. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

SEC. 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

SEC. 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

SEC. 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition.

SEC. 5074. When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct

contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SEC. 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SEC. 5076. Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court, within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court, in the judicial district where such creditor, or either one of joint creditors, reside; but proof taken before a commissioner, shall be subject to revision by the register of the court.

SEC. 5077. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced, or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

SEC. 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SEC. 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul

of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the same.

SEC. 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SEC. 5081. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SEC. 5082. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

SEC. 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

SEC. 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

SEC. 5085. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

SEC. 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

SEC. 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

SEC. 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the

bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

SEC. 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

SEC. 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

SEC. 5091. All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

SEC. 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

SEC. 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

SEC. 5094. The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

SEC. 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SEC. 5096. Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the

accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

SEC. 5097. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

SEC. 5098. If by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

SEC. 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

SEC. 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

SEC. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State. [See §§ 3466–3468.]

SEC. 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditors shall be paid by the assignee in such manner as the court may direct.

SEC. 5103. If at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct,

three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt, or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

CHAPTER FIVE.

PROTECTION AND DISCHARGE OF BANKRUPTS.

SEC. 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

SEC. 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.

SEC. 5106. No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

SEC. 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

SEC. 5108. [*At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts.*] [At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may

apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.]

SEC. 5109. Upon application for a discharge being made the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

SEC. 5110. No discharge shall be granted, or, if granted, shall be valid, in any of the following cases:

First. If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

Fourth. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

SEC. 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in

its discretion order any question of fact so presented to be tried at a stated session of the district court.

SEC. 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

SEC. 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

SEC. 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

SEC. 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, district of

Whereas has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "BANKRUPTCY," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at , in the said district, this day of

(Seal.) , Judge.

SEC. 5116. No person who has been discharged, and afterward becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SEC. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

SEC. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

SEC. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting

a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

SEC. 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

CHAPTER SIX.

PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

SEC. 5121. Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the

payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SEC. 5122. The provisions of this Title shall apply to all moneyed business or commercial corporations and joint-stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof.

SEC. 5123. Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

CHAPTER SEVEN.

FEES AND COSTS.

SEC. 5124. In each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, two dollars.

Second. For each day in which a meeting is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust-deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this [*act*] [title,] one dollar.

Seventh. For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

SEC. 5125. The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the Supreme Court, and paid out of the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

SEC. 5126. Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

SEC. 5127. The enumeration of the foregoing fees shall not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

CHAPTER EIGHT.

PROHIBITED AND FRAUDULENT TRANSFERS.

SEC. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

SEC. 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this [*act*] [title,] or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

SEC. 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be prima-facie evidence of fraud.

SEC. 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

SEC. 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any

part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, willfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

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